TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 210

HOWARD HALL COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA

FILED JUNE 26, 1941.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 3, 1941.

—7148

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

No. 5215

HOWARD HALL COMPANY, INC.

versus

UNITED STATES OF AMERICA

PETITION OF HOWARD HALL COMPANY—Filed February 28, 1941

To the Honorable, the Judges of the District Court of the United States, for the Northern District of Alabama, Southern Division:

The petition of Howard Hall Company, Inc. respectfully shows:

1

Howard Hall Company, Inc. is a corporation organized under the laws of Alabama and has its principal office and principal place of business located in Birmingham, County of Jefferson, Alabama.

2

This is a suit brought against the United States to set aside orders of the Interstate Commerce Commission and to require an investigation of the matters involved. This suit is brought under the provisions of Section 205 (g) of Part II of the Transportation Act of 1940, which provides for review of final orders of the Interstate Commerce Commission. Jurisdiction of this court depends upon sub-division 28 of Section 41 and Sections 43 and 45-48, inclusive of Title 28 of the United States Code, which provides for actions to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission and the jurisdiction of said court depends upon the fact that this action arises under the Constitution and laws of the United States and is brought to set aside an order of the Interstate Commerce Commission.

2

3

The petitioner, Howard Hall Company, Inc., is a common carrier motor vehicle engaged in the transportation of commodities generally in interstate commerce between points [fol. 2] in the states of Alabama, Mississippi, Louisiana, Florida, Georgia, Tennessee, Kentucky, Indiana, Ohio, West Virginia, Virginia, North Carolina, South Carolina, Maryland, Delaware, Pennsylvania, New York. Petitioner began these operations prior to June 1, 1935, and has continuously conducted the operations set out above since that time. In compliance with the provisions of the Motor Carrier Act of 1935, petitioner, in accordance with the rules of the Commission, filed an application for a certificate of convenience and necessity under the provisions of Section 206 of that Act. 49 Stat. 551; 52 Stat. 1238; 49 U. S. C. A., Section 306. This application filed by petitioner sought authority to operate as a common carrier of commodities generally over irregular routes between points in the States set out above. The application was filed within the required one hundred twenty (120) days from October 1, 1935.

4

The application of petitioner was assigned Docket No. MC-42318 by the Interstate Commerce Commission and was set by the Commission for hearing before an Examiner of the Commission on February 15, 1937. At this hearing, petitioner introduced evidence of its operations prior to June 1, 1935 and continuously since that time. The recommended report and order of the Trial Examiner was issued May 13, 1937, but upon motion of the petitioner this order was set aside and the case was reassigned for further hearing on August 20, 1937. At this hearing additional testimony and exhibits showing the operations of petitioner prior to June 1, 1935 and also between June 1, 1935 and October 15, 1935 were introduced. On November 30, 1937, the Trial Examiner issued an order recommending that certain rights be granted. Exceptions to this recommended order and report were filed by petitioner in compliance with the rules of the Interstate Commerce Commission. On July 10, 1940, Division 5 of the Interstate Commerce Commission decided the case and in doing so granted only part of the authority applied for and issued an order that part of the application be denied. The effective date of this order was

August 31, 1940. A copy of the decision and order thereon is attached hereto and marked Exhibit A and made a part of this paragraph of this petition.

[fol. 3] 5

Your petitioner, before August 31, 1940, filed an application to the Commission to rehear and reconsider its order, on the ground that the undisputed testimony demonstrated that a finding that all of the authority sought should have been granted and upon further ground that the Commission had not considered the documentary evidence of operations which were conducted by petitioner between June 1, 1935 and October 15, 1935 and continuously since that time. Several postponements of the effective date of the order of August 31, 1935 were granted by the Commission, but on February 3, 1941, the Interstate Commerce Commission issued a final order of denial, a copy of which is attached hereto and marked Exhibit B, and made a part of this paragraph of this petition.

6

In the investigation conducted by the Interstate Commerce Commission and in the opinion of the Commission and its findings and conclusions and orders based thereon, petitioner submits that the Commission acted arbitrarily, contrary to the law and contrary to the evidence in the following particulars, to-wit:

(a) The Commission, in its decision, found:

"Of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, 55 moved to or from points within 100 miles of Birmingham, 50 moved between points in States other than Alabama, and 15 moved from Fowl River, Ala. The 15 shipments from Fowl River were handled during 1934 and consisted of satsumas destined to points in six States. None have been transported from that point since.

"Of 2,550 shipments handled after June 1, 1935, 2,030 moved to or from Birmingham, 270 moved to or from points within 100 miles of Birmingham, and 250 moved between points in States other than Alabama.

"Of the 50 shipments transported prior to June 1, 1935, between points in States other than Alabama, 30 moved from Vincennes and Seymour, Ind., to eight points in

Georgia, and 10 from Wheeling, W. Va., to four points in Tennessee. The remaining 10 shipments moved between scattered points in eight States.

"Of 875 shipments moving to or from Birmingham prior to June 1, 1935, 700 were transported to or from 47 points in North Carolina, 34 points in Georgia, 18 points in Mississippi, 20 points in South Carolina, and 20 points in that part of Florida north of and including Tampa and Lakeland." (Sheets 3 and 4)

[fol. 4] It was further stated:

"It is clear that shipments other than those described above, moving prior to June 1, 1935, between points in States other than Alabama, and between Birmingham and vicinity, on the one hand, and other states, on the other, were not made with any degree of regularity and do not represent a substantial showing of service sufficient to establish bona fide operations since prior to June 1, 1935, from, to, and between all points in the broad territory claimed." (Sheet 7.)

After these statements, the Commission then found that the petitioner was entitled to operate as a common carrier

"* * * between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee thence U. S. Highway 192 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Wheeling to Chattanooga and Birmingham; all over irregular routes; * * *" (Sheet 8.)

The petitioner having produced conclusive evidence of 55 movements of freight to or from points within 100 miles of Birmingham prior to June 1, 1935, and 270 movements of freight thereafter, it was error as a matter of law for the Commission to deny the right to operate in this territory.

(b) Even though the petitioner's application was broader than its proof, the Commission erred in not granting the authority which was supported by positive evidence of operation. It was error as a matter of law not to grant the authority in accordance with the evidence and actual findings of the Commission, even though the authority applied for might have been greater. The findings of the Commission showed movements between points in the territories and 100 mile radius of Birmingham and it was error of the Commission to limit the scope of petitioner's operation to within ten miles of Birmingham.

(c) The Commission erred as a matter of law in granting authority to transport limited commodities between certain points because if the findings show any movement of any [fol. 5] commodity between points and places or within a territory, the Commission should grant authority within that territory for all commodities and should not restrict the transportation to limited commodities. For example, the Commission found that petitioner had operated as a common carrier "of paper and paper products from Birmingham to New Orleans, Louisiana, Chattanooga and Knoxville, Tennessee." Under Section 206 of the Motor Carrier Act, the Commission is without jurisdiction to limit the operations of any applicant to certain commodities. The Act refers to routes and territories and it was error for the Commission to limit the operations of petitioner to limited commodities if they found that applicant had operated between the points or within the territory.

(d) The Commission erred as a matter of law in considering evidence of continuous operations beyond the date of filing of this application, to-wit: February 12, 1936. Section 206 of the Motor Carrier Act requires a finding of operations prior to June 1, 1935 and "continuously since that time." Since that time could only mean since the time of the filing of the application. Therefore, the Commission erred as a matter of law in not granting the operations proved by the applicant prior to June 1, 1935 and continuously until February 12, 1936.

(e) The Commission erred as a matter of law in not considering the evidence of operations between June 1, 1935 and October 15, 1935. Section 206 (b) provides:

"Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such

form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission."

Under the foregoing provisions, it was mandatory that the Commission review this evidence and grant a certificate in accordance with the proof of operations during this interim period.

[fol. 6] 7

Petitioner began its operations in 1934 and has operated continuously since that time. Prior to that time petitioner's general manager and principal stockholder had operated for about four years, which rights were transferred to Howard Hall Company, Inc. Petitioner has developed a large volume of business between points in Alabama and points in Virginia, Maryland, District of Columbia, New Jersey, New York, Pennsylvania and Delaware. If the present order of the Interstate Commerce Commission is allowed to stand, the public will suffer irreparable damage because a large amount of petitioner's business is within the aforesaid territory. Under the existing order, petitioner will be required to cease operations within this territory and the shipping public would be deprived of petitioner's service, which it has enjoyed for the past ten years. Unless the order of the Commission is stayed by this court, the petitioner will be deprived of forty per cent of its present operating revenue, which will cause irreparable injury and damage to your petitioner and would result in irreparable injury and damage to the shipping public.

Wherefore, petitioner prays:

(1) That the court temporarily stay the order of August 31, 1940, issued by the Commission, which became final on

February 3, 1941, pending hearing upon interlocutory injunction, so that petitioner and the general public will not suffer irreparable injury and damage as a result of the order becoming effective.

(2) That an interlocutory injunction be granted sustaining and restraining the enforcement, operation and execution of said order of the Interstate Commerce Commission insofar as such orders amount to a denial of the authority applied for in petitioner's application before the Commission under Section 206 of the Motor Carrier Act.

(3) That a permanent injunction be granted restraining the enforcement, operation and execution of said order of the Interstate Commerce Commission insofar as such orders amount to a denial of the authority applied for in peti- [fols. 7-8] tioner's application before the Commission under Section 206 of the Motor Carrier Act.

(4) That the application of petitioner before the Interstate Commerce Commission be reopened for further proceedings before the Commission in accordance with the prayers of this complaint.

(5) That notice hereof be served upon the United States, by serving a copy thereof upon the District Attorney of the Northern District of Alabama, Southern Division, and upon the Attorney-General of the United States, and upon the Secretary of the Interstate Commerce Commission, according to law, and that a temporary restraining order, interlocutory injunction and permanent injunction be granted, according to the prayers of this complaint.

(6) That a 3-Judge Court be assembled, as required by statute, that a hearing be had at the earliest possible date to the end that irreparable damage may be prevented by the granting of a temporary restraining order and an interlocutory injunction.

(7) That the court make such other and further orders as is meet and proper in the premises and petitioner will ever pray.

(Signed) Edgar Watkins and Allan Watkins, Boutwell & Pointer, Attorneys for Petitioner, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia.

Duly sworn to by Howard Hall. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed Feb. 28, 1941

The foregoing bill read and considered. Let notice be given to the United States, as required by the statutes governing such a proceeding.

The order of the Interstate Commerce Commission dated August 31, 1940, which, by another order, became effective February 3, 1941, is hereby stayed and set aside pending hearing upon interlocutory injunction and the Interstate Commerce Commission is hereby restrained from interfering with the operations of petitioner in accordance with the authority heretofore applied for by petitioner in its application to the Commission under Section 206 of the Motor Carrier Act. Petitioner having operated as a common carrier for the past seven years in accordance with its application, irreparable injury would result to petitioner and the general public if the restraining order were not granted pending further hearing of this application.

This 28th day of February, 1941.

T. A. Murphree, Judge, District Court of the United States, for the Northern District of Alabama, Southern Division.

[File endorsement omitted.]

[fol. 10] EXHIBIT A TO PETITION

INTERSTATE COMMERCE COMMISSION

No. MC-42318

HOWARD HALL, INC., Common Carrier Application

Submitted February 4, 1938. Decided July 10, 1940.

REPORT OF THE COMMISSION

Division 5, Commissioners Lee, Rogers, and Patterson, by Division 5:

Exceptions were filed by applicant and by protestants to the order recommended by the examiner. Our conclusions differ from those recommended.

By application filed February 11, 1936, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, Howard Hall Company, Inc., of Birmingham, Ala., seeks a certificate of public convenience and necessity authorizing continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virgina, Maryland, Delaware, Pennsylvania, New Jersey, New York, District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson.

Two hearings have been held. At the first the application was amended by eliminating therefrom all points in Wisconsin, Texas, Arkansas, Kansas, and Missouri, and points in Florida south of Tampa and Lakeland, and points north of Chicago. Certain rail and motor carriers opposed the application.

Applicant was incorporated in Alabama in 1934 and in [fol. 11] July 1934 it was registered under the Code of Fair Competition for the trucking industry. As of June 1, 1935, applicant owned and operated 11 trucks which number had increased to 17 at the time of the first hearing in February 1937. Although applicant claims "grandfather" rights to conduct operations between all points in a vast territory comprising practically all of the United States east of the Mississippi River except the New England States, the record shows that prior to June 1, 1935, its traffic moved preponderately between Birmingham and vicinity, on the one hand, and various points in eastern United States, on the other. As will hereinafter be shown, applicant has not served enough representative points in all the States claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application.

Exhibits purporting to show all shipments in interstate or foreign commerce handled by applicant during the years 1934, 1935, and 1936, were submitted in evidence. These include operations into territories which have been withdrawn from the application. Those operations will not be

considered further. Of 1,000 [1] shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, 55 moved to or from points with 100 miles of Birmingham, 50 moved between points in States other than Alabama, and 15 moved from Fowl River, Ala. The 15 shipments from Fowl River were handled during 1934 and consisted of satsumas destined to points in six States. None have been transported from that point since.

Of 2,550 shipments handled after June 1, 1935, 2,030 moved to or from Birmingham, 270 moved to or from points within 100 miles of Birmingham, and 250 moved between points in States other than Alabama.

Of the 50 shipments transported prior to June 1, 1935, between points in States other than Alabama, 30 moved from Vincennes and Seymour, Ind., to eight points in Georgia, and 10 from Wheeling, W. Va., to four points in Tennessee. The remaining 10 shipments moved between scattered points in eight States.

Of 875 shipments moving to or from Birmingham prior [fol. 12] to June 1, 1935, 700 were transported to or from 47 points in North Carolina, 34 points in Georgia, 18 points in Mississippi, 20 points in South Carolina, and 20 points in that part of Florida north of and including Tampa and Lakeland. In this operation the record shows that prior to and since June 1, 1935, applicant handled a wide variety of commodities including paper and paper products, cloth, preserves, peanut butter, building materials, ornamental iron, glass bottles, pipe, plumbing fixtures, canned goods, fruits and vegetables.

In Reliance Trucking Co., Inc., Contract Carrier Application, 4 M. C. C. 594, in discussing bona fide operation within the meaning of section 206 (a) of the act, division 5 said:

On the other hand, the word "operation" is not to be too narrowly construed, and in that connection the holding out of the carrier must be taken into consideration. For example, in the case of a common carrier of household goods or of oil-field supplies serving a large territory over irregular routes, we grant certificates under the "grand-

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[1] Numbers of shipments handled during specified periods or between certain points herein mentioned are approximations.

father" clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting "grandfather" certificates to haul "general commodities," that each and every commodity within that description has actually been carried. The question is whether there has been operation within the "grandfather" period consistent with the holding out in the natural and normal course of business. A mere holding out without evidence of the operation consistent therewith is not enough.

In the instant proceeding, the record shows that prior to and since June 1, 1935, applicant has held itself out to transport general commodities, with certain exceptions,[2] between Birmingham and vicinity, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those points in that part of Florida north of and including Tampa and Lakeland, and has actually conducted an operation consistent with such holding out.

In addition the record shows that prior to and since June 1, 1935, applicant transported paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tennessee, and from Kingsport, Tenn., to Birmingham; nails, pipe, pipe fittings, steel, and metal ceilings [fol. 13] from Canton, Ohio, to Birmingham; cloth from Alabama City, Ala., to Wheeling, W. Va., and matches from Wheeling to Chattanooga and Birmingham.

The record shows that applicant also transported cloth from Birmingham to Versailles, Ohio, and Huntington, W. Va., and from Canton and Jasper, Ala., to Wheeling, W. Va.; canned goods from Vincennes, Underwood, Plainville, and Washington, Ind., to Birmingham, Montgomery, and Anniston, Ala., and from Vincennes and Seymour, Ind., to eight points in Georgia; scrap metals, aluminum castings, and brass from Birmingham to Chicago; aluminum from Birmingham to East Chicago, Ind.; ornamental iron, bolts, thresholds, and other building materials from Birmingham to Danville, Ill. Although these operations were performed

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[2] The record does not show that applicant ever transported or held itself out to transport commodities of unusual value, high explosives, commodities in bulk, or those requiring special equipment.

with some degree of regularity prior to June 1, 1935, the record fails to show that such service has been performed regularly since that date.

On exceptions, applicant concedes that it may not be entitled under the "grandfather" clause to authority to transport general commodities from, to, and between all points covered by the amended application, but it insists that it is entitled to authority to transport general commodities between Birmingham and points within 100 miles thereof, on the one hand, and, on the other, all points in North Carolina, South Carolina, Georgia, Louisiana, Mississippi, Tennessee, Ohio, Indiana, Illinois, West Virginia, and those in Florida north of and including Tampa and Lakeland. As pointed out above, however, only 55 shipments were transported prior to June 1, 1935, to or from points within 100 miles of Birmingham. The record shows further that only 12 points were served in this comparatively large territory surrounding applicant's headquarters at Birmingham. Undoubtedly, however, applicant did serve various industries located in the immediate vicinity of Birmingham. The extent of this industrial area is not clear from the record but we believe that a radius of 10 miles of Birmingham will include all that is imoprtant.

[fol. 14] nI *Powell Bros. Truck Lines, Inc., Com. Car. Application*, 9 M. C. C. 785, upon considering operations over irregular routes in a broad territory division 5 said:

> Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the "grandfather" clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service.

It is clear that shipments other than those described above, moving prior to June 1, 1935, between points in

States other than Alabama, and between Birmingham and vicinity, on the other hand, and other States, on the other, were not made with any degree of regularity and do not represent a substantial showing of service sufficient to establish bona fide operations since prior to June 1, 1935, from, to, and between all points in the broad territory claimed. No shipments whatever are shown to have been handled by applicant prior to June 1, 1935, to or from points in Delaware, Maryland, Michigan, New Jersey, and the District of Columbia.

Applicant also claims the right to transport uncrated household goods. The record shows, however, that prior to June 1, 1935, only two shipments of household goods were transported, one from Gorgas, Ala., to Panama City, Fla., and the other from Birmingham to Atlanta, Ga. Both shipments were made on February 1, 1935. Although we are inclined to be liberal in granting authority to so-called household goods movers, we are of the opinion that these two shipments of household goods are not a sufficient basis for the granting of authority under the "grandfather" clause of the act. It is clear that applicant has never had a [fol. 15] specialized household moving service.

We find that applicant was, on June 1, 1935, and continuously since that time, has been, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, high explosives, commodities in bulk, commodities requiring special equipment, and household goods, uncrated or in lift vans in connection with so-called "household movings," between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee thence U. S. Highway 192 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Wheeling to Chattanooga and Birmingham; all over irregular routes; that by reason of such operation it is entitled to a certificate authorizing the continuance thereof;

and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and with our rules, regulations, and requirements thereunder, an appropriate certificate will be issued. An order will be entered denying the application, except to the extent that the issuance of a certificate is authorized in the above findings.

[fol. 16] ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 10th day of July, A. D. 1940.

No. MC-42318

HOWARD HALL COMPANY, INC., Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof, having made and filed its report herein, containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby denied, effective August 31, 1940.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 17] EXHIBIT B TO PETITION

Order

At a General Session of the Interstate Commerce Commission, Held at its office in Washington, D. C., on the 3rd day of February, A. D. 1941.

No. MC 42318

Howard Hall Company, Inc.

Common Carrier Application

Birmingham, Alabama

Upon consideration of the record of the above-entitled matter, of applicant's petition for further hearing, consolidation with No. MC 42318 (Sub No. 1), and further postponement of the effectiveness of the denial order herein; and good cause appearing:

It is ordered, That the said petition be, and it is hereby denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 18] PLAINTIFF'S EXHIBIT NO. 1

(Here follow 2 photolithographs, side folios 19-20)

Plaintiff's Exhibit No. 1

Plaintiff's Exhibit No.1

Form B.M.C. A.

26

ALTERNATE FORM

PROPERTY AND PASSENGER CARRIER APPLICATION

(Under "Grandfather" Clause)

(This form may be used only by Common Carriers engaged in transportation of property or passengers in interstate or foreign commerce on June 1, 1935, and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter, and may be used in lieu of either B.M.C. 1 or 2, and must be filed on or before February 12, 1936.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of Howard Hall Co. Inc. (Full name)) DOCKET NO. 42318 (Do not fill in)
for appropriate authority to continue to operate as a motor carrier under the Motor Carrier Act, 1935.)

APPLICATION

To the Interstate Commerce Commission, Washington, D. C.

APPLICANT STATES:

Applicant's name is Howard Hall Co. Inc.

Business address ~~1909 Avenue B. South~~ 2809-2nd Ave. (Street and number) Birmingham (City)

Jefferson (County) Alabama (State)

Applicant is a Corporation (Individual, partnership or corporation) doing business under the trade name or style of

Applicant, or its predecessor in interest, was in bona fide operation in interstate or foreign commerce as a common carrier of passengers or property by motor vehicle on June 1, 1935, or as a contract carrier by motor vehicle on July 1, 1935, and has so operated as such continuously since the applicable date, except as to interruptions of service over which the applicant or its predecessor in interest had no control, over the route or routes or within the territory as follows:

See Exhibit Attached
(Describe briefly the route, routes, or territory served)

INTERSTATE COMMERCE COMMISSION RECEIVED FEB 11 1936

To the Interstate Commerce Commission, Washington, D. C.

APPLICANT STATES:

Applicant's name is **Howard Hall Co. Inc.**

Business address ~~1909 Avenue B. South~~ 2809-2nd Ave. **Birmingham**
(Street and number) (City)

Jefferson **Alabama**
(County) (State)

Applicant is a **Corporation** doing business under the trade name or style of
(Individual, partnership or corporation)

Applicant, or its predecessor in interest, was in bona fide operation in interstate or foreign commerce as a common carrier of passengers or property by motor vehicle on June 1, 1935, or as a contract carrier by motor vehicle on July 1, 1935, and has so operated as such continuously since the applicable date, except as to interruptions of service over which the applicant or its predecessor in interest had no control, over the route or routes or within the territory as follows:

See Exhibit Attached
(Describe briefly the route, routes, or territory served)

INTERSTATE COMMERCE COMMISSION RECEIVED FEB 11 1936

In filing this application, Applicant agrees to furnish all of the facts, statements, data, and evidence which are required in Forms B.M.C. 1 or 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

Applicant has complied with the orders of the Commission relative to the service of application on interested parties; and will submit such additional information to substantiate Applicant's prayer herein as the Commission may require.

plicant reserves the right to claim exemption from any and all provisions of the Motor Carrier Act, 1935, and the filing of this application shall not be deemed a waiver thereof.

WHEREFORE, Applicant hereby applies to the Interstate Commerce Commission for appropriate authority to continue to operate as a motor carrier, pursuant to Section 206(a) or Section 209(a) of the Motor Carrier Act, 1935.

Dated this **8th** day of **February**, 193**6**.

Howard Hall Co. Inc.
(Applicant)

By Howard L Hall (Title) **President**

(OVER)

16A

Form F.M.C. A.

27

OATH

State of _____)
) ss:
County of Alabama)

Jefferson

_____ makes oath and says that he is the _____
(Name of affiant) (Title of affiant)

Howard L. Hall President

of the _____, that he is authorized on the part of said applicant to
(Name of Applicant)

Howard Hall Co. Inc.

verify and file with the Interstate Commerce Commission this application; that he has carefully examined all of the statements contained in such application; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Howard L Hall

Subscribed and sworn to before me, a _____ in and for the State and County above named,
Notary Public

this _____ day of _____, 193__
8th February 6

(SEAL)

My commission expires June 1- 1936

N B Benton

GENERAL INSTRUCTIONS

This is an emergency form which MAY be used as an alternate form in lieu of either Forms B.M.C. 1 or 2, by those claiming rights under the "Grandfather" clause of the Motor Carrier Act, 1935, as Common Carriers of property or passengers on June 1, 1935, or Contract Carriers on July 1, 1935, and continuously thereafter in interstate or foreign commerce. All those who use this form will be required subsequently to support the allegations of the application by furnishing all of the facts, statements, data, and other evidence required in Forms B.M.C. 1 and 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

"Certificates of public convenience and necessity" will be issued to Common Carriers, and "Permits" to Contract Carriers.

Applications on this form or on B.M.C. 1 or 2 must be filed on or before February 12, 1936. The Interstate Commerce Commission does not have authority under the Motor Carrier Act, 1935, to further extend the time for filing beyond said date. Loss of rights under the "Grandfather" clause will result from a failure to file applications therefor within the time above specified. If an operator is in doubt as to whether the service he renders comes within any of the exemptions provided in the Act, he should file an application. The filing of such application will not be deemed a waiver of any right to claim exemption from any and all provisions of the Motor Carrier Act, 1935.

Applications should be typed, and one copy kept in Applicant's files. The original of this application, properly signed and sworn to before a notary public, and one additional copy must be returned to:

THE INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON, D.C.

and one true copy must be filed with the Board, or Governor if there is no Board, of each State within which operations covered by this application are conducted.

[fol. 21] Our operations cover the following states, and the following towns and cities but not limited to the towns as we serve the intermediate points, and also serve towns and cities within a radius of two hundred miles of these towns and cities.

Alabama

Birmingham, Jasper, Tuscaloosa, Eutaw, Demopolis, Jackson, Mobile, Andalusia, Dothan, Troy, Eufaula, Opelika, Montgomery, Clanton, Sylacauga, Anniston, Huntsville, Gadsden, Florence.

Tennessee

Chattanooga, Knoxville, Kingsport, Nashville, Dickson, Memphis, Jackson.

Kentucky

Louisville, Harlan.

Indiana

Indianapolis, Austin, Vincennes, Richmond, Auburn, Fort Wayne.

Michigan

Benton Harbor, Detroit.

Illinois

Chicago, Harrisburg, Effingham, Danville, Springfield, Peoria, Zion, Kewanee, Alton.

Wisconsin

Marshfield, Milwaukee.

Missouri

Springfield, St. Louis, Kansas City, St. Joseph.

Kansas

Topeka, Garnett.

Arkansas

Little Rock, Hot Springs, Stuttgart.

Louisiana

Shreveport, Ruston, New Orleans, Alexandria, Baton Rouge, Houma, De Ridder.

[fol. 22] Ohio

Cincinnati, Versailles, Columbus, Canton, Sandusky.

District of Columbia

Washington.

[fol. 23] Mississippi

Columbus, Tupelo, Corinth, Greenville, Vicksburg, Natchez, Brookhaven, Jackson, Meridian, Hattiesburg, Laurel, Gulfport, Pascagoula.

Florida

Pensacola, Panama City, Jacksonville, Tampa, Miami, Daytona Beach.

South Carolina

Columbia, Greenwood, Greenville, Spartanburg, Chester, Cheraw, Hartsville, Sumter, Charleston, Conway.

North Carolina

Belmont, Charlotte, Canton, Asheville, Roddus, Marion, Winston Salem, Greensboro, Raleigh, Durham, Fayetteville, Wilmington, Washington.

West Virginia

Huntington, Charleston, Wheeling.

Virginia

Norfolk, Suffolk, Danville, Fredricksburg, Richmond, Harrisonburg, Winchester, Front Royal, Chase City.

Maryland

Baltimore.

Delaware

Wilmington.

Pennsylvania

Philadelphia, Reading, Pittsburgh, Erie, Easton.

New Jersey

Trenton.

New York

New York City, Buffalo.

Texas

Henderson.

We desire to cooperate with you in every way possible, and we hold our books, records and entire operation open to you for your inspection at all times.

Howard Hall Co., Inc. Howard L. Hall.

[fols. 24-209] (Note: The other papers in Plaintiff's Exhibit #1 were not designated in the record, and are omitted from this transcript.)

[fol. 210] Decision of Division 5 of the Interstate Commerce Commission Rendered July 10th, 1940

Omitted. Printed side page 10 ante.

[fol. 211] Order of the Interstate Commerce Commission Issued February 3, 1941, Denying Petition for Further Rehearing

Omitted. Printed side page 17 ante.

[fol. 212] In the District Court of the United States for the Northern District of Alabama, Southern Division

[Title omitted]

Answer of the United States of America—Filed April 14, 1941

The defendant, United States of America:

1. Admits the allegations of paragraphs 1 and 2 of the complaint.

2. Admits those allegations of paragraphs 3, 4, 5 and 7 which correspond to the statement of the proceedings, and

to the findings of fact, contained in the report of the Commission, attached as Exhibit A to the complaint; and denies all others.

3. Denies the allegations of paragraph 6.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C. Counsel for the United States.

Thurman Arnold, Assistant Attorney General; Jim C. Smith, Esq., United States Attorney.

April —, 1941.

[fol. 213] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed April 14, 1941

Comes now the Interstate Commerce Commission (hereinafter called the Commission) and, pursuant to leave of Court granted under Sections 212 and 213 of the Judicial Code (U. S. C. Title 28, Sec. 45a) having intervened as a party defendant in the above-entitled cause, for its answer to the complaint herein, says:

I

Answering paragraphs 1 and 2 of the complaint, the Commission, for the purposes of this answer and none other, admits the truth of the allegations therein contained.

[fol. 214]

II

Answering the allegations of paragraphs 3 to 7, inclusive, of the complaint, the Commission admits that the plaintiff is at present a common carrier by motor vehicle, but states that it has no knowledge sufficient to form a belief as to the nature and extent of the plaintiff's present operation as such, and the Commission denies that prior to June 1, 1935, and continuously since that date, the plaintiff has conducted the operations alleged in paragraph 3 of the complaint or as alleged in the plaintiff's application for a certificate of convenience and necessity under the Motor Carrier Act which, as alleged in said complaint, the plaintiff filed with the Commission in 1935.

Further answering said paragraphs of the complaint, the Commission alleges and shows that on or about February 11, 1936, plaintiff filed with the Commission its application for a "grandfather" certificate as a common carrier or a permit as a contract carrier under Section 206 or Section 209 of the Motor Carrier Act of 1935, which would authorize operation by the plaintiff between all points within the states of Alabama, Georgia, Tennessee, Kentucky, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, District of Columbia, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey and New York, and designated portions of Michigan, Kansas and Texas; that upon said application the Commission instituted a proceeding entitled Docket No. 42318, *Howard Hall Company, Inc. Common Carrier Application;* that divers other carriers [fol. 215] by rail and by motor vehicle intervened, protested and objected to the issuance of the certificate or permit prayed by the plaintiff; that the Commission set the matter for hearing before a Commission examiner on February 15, 1937, at Birmingham, Ala.; that at the opening of said hearing the plaintiff withdrew from its application all points within the states of Wisconsin, Texas, Arkansas, Kansas and Missouri and points within certain portions of Florida and Illinois; that plaintiff introduced, and the examiner received, evidence offered by the plaintiff in support of its application, and on or about May 13, 1937, the examiner submitted to the Commission and served upon the parties to the proceeding his proposed report and order, in which it was recommended that the Commission grant in part plaintiff's application and deny the rest thereof, whereupon, on or about May 26, 1937, before the Commission had acted upon the aforesaid recommended report and order, the plaintiff filed with the Commission its written application alleging that the evidence adduced by it at the hearing on February 15, 1937, was inadequate and insufficient to justify the issuance of the certificate prayed by it and asking that the proceeding be reopened in order that it might more fully prove its operations, etc.; that on or about June 18, 1937, the Commission granted plaintiff's application aforesaid and reopened said proceeding for further hearing; that the second hearing of the matter was had at Birmingham, Ala., August 20, 1937, at which plaintiff and protestants introduced additional evidence; that on or about November

30, 1937, the Commission examiner submitted his second recommended report and order, to which the plaintiff and [fol. 216] also the protestants in due time filed their respective exceptions and briefs; that said exceptions to the proposed report were duly considered by the Commission, and on or about July 10, 1940, the Commission, by its Division 5, made its final report and order, a true copy of which is attached to and made a part of the complaint herein, being marked Exhibit A thereto; that said decision of the Commission is officially reported in 24 M. C. C. (Motor Carrier Cases) 273; that in and by said report and order the Commission directed the issuance of a certificate to the plaintiff authorizing in part its operation as a common carrier as prayed in its application, but denying its application in all other respects. For specific information as to the exact respects in which said application was granted or denied, the Court is respectfully referred to said report and order.

That thereafter, to wit, on August 10, 1940, the plaintiff filed with the Commission its petition for a rehearing of its "grandfather" application under Section 206 and also for a consolidation of said proceeding upon rehearing with another proceeding growing out of another and subsequent application by plaintiff for a certificate under Section 207 of the Motor Carrier Act, and that, after consideration, the entire Commission denied said application by an order made October 1, 1940; that on or about October 16, 1940, the plaintiff filed another petition in which it prayed the reopening of said "grandfather" proceeding, which motion the Commission, by an order entered February 3, 1941, denied.

Further answering said paragraphs of the complaint, the Commission alleges and shows that throughout the course [fol. 217] of the proceedings above described, the plaintiff and all other parties to said proceedings were, and each of them was, afforded the full hearing provided for in and by the Interstate Commerce Act; that at the hearings aforesaid a large volume of testimony and other evidence bearing upon the issues involved in said proceedings was received and submitted to the Commission for its consideration; that said issues were fully argued and submitted to the Commission for its consideration, and that the Commission's report and order of July 10, 1940, include the Commission's findings of fact, decision, conclusions, orders and requirements in the premises made upon the evidence presented to it as shown in and by said report; that the find-

ings and conclusions set out in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings; that in making said report and order the Commission did not fail to consider any evidence which it should have considered, but considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition shown in the evidence which was relevant and material to the determination of the issues involved.

The Commission further alleges and shows that its report and order of July 10, 1940, was not and is not unreasonable, arbitrary, capricious, unlawful or in excess of the Commission's lawful powers and jurisdiction, and the Commission denies each of and all the allegations to the contrary contained in said complaint.

[fols. 218-219] Further answering said complaint, and particularly paragraph 6 thereof, the Commission admits that included in its report are the six isolated clauses set out verbatim in said paragraph of the complaint, but the Commission denies that said quoted portions of the report constitute a full, true or correct statement of the Commission's findings and conclusions in said proceeding and respectfully refers the Court to the complete report which is set out as Exhibit A to the complaint herein.

Further answering the complaint, and particularly paragraph 7 thereof, the Commission denies that its report and order of July 10, 1940, will cause plaintiff any irreparable injury or damage or any legal injury or damage whatever.

III

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, in so far as they conflict either with the allegations herein stated or with those contained in the Commission's said report of July 10, 1940.

Wherefore the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, by Nelson Thomas, Attorney, 3328 Interstate Commerce Bldg., Washington, D. C.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

Duly sworn to by William E. Lee. Jurat omitted in printing.

[fol. 220] DEFENDANTS' EXHIBIT No. 1

Certificate of the Secretary of the Interstate Commerce Commission

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Application, including Exhibits B, B-1-c, C, D, E, C-2, D-1 and D-3 (but exclusive of all other exhibits and supporting data), filed October 30, 1939 on Form B. M. C. 8;

Petition for amendment filed January 13, 1940; and

Report and Order of the Commission filed and entered January 3, 1941,

No. MC-42318 Sub-No. 1, Howard Hall Company, Inc., Eastern Territory Extension, the originals of which are now on file and of record in the office of this Commission.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Commission this 11th day of April, A. D. 1941.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal affixed.)

Form B. M. C. 8

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY—PROPERTY

(This form is to be used by applicants who propose, as common carriers of property, (1) to continue an operation, or the extension of an operation, in interstate or foreign commerce instituted between June 1, 1935, and October 15, 1935, inclusive; (2) to institute an operation in interstate or foreign commerce at any time subsequent to October 15, 1935; or (3) to extend an operation for which a separate application has been filed with or certificate issued by the Interstate Commerce Commission under the Motor Carrier Act, 1935.)

(Before answering, read General Instructions on last page. Numbers under line refer to Special Instructions on that page)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of HOWARD HALL COMPANY, INC. (Full and correct name)

for a Certificate of Public Convenience and Necessity authorizing common carrier service in the transportation of property in interstate or foreign commerce under the Motor Carrier Act, 1935.

DOCKET No. 42318 Sub 1

C-42348 Ltr Odd

APPLICATION

To the INTERSTATE COMMERCE COMMISSION, WASHINGTON, D. C.

Applicant States:

I. That full and correct name of applicant is HOWARD HALL COMPANY, INC.

Business address 2809 Second Avenue, South, (Street and number) Birmingham (City) Jefferson (County) Alabama (State)

II. That applicant is a (1) Corporation, doing business or proposing to do business under the trade name or style of Howard Hall Co., Inc., and that information respecting applicant is set forth in EXHIBIT A, attached hereto and made a part hereof.

III. That applicant herein applies for authority (1) to continue an operation ____ (Check), or the extension of an operation ____ (Check) as a common carrier of property in interstate or foreign commerce, which operation or extension was instituted between June 1, 1935, and October 15, 1935, inclusive; (2) to institute such an operation at a time subsequent to October 15, 1935 ____ (Check); or (3) to extend an operation for which a separate application has been filed with or certificate issued by the Interstate Commerce Commission under the Motor Carrier Act, 1935 X (Check); and that a description of the operation or extension for which authority is sought herein and of the class or classes of property transported or to be transported, is set forth in detail in EXHIBIT B, attached hereto and made a part hereof.

IV. That applicant sets forth, in EXHIBIT C, attached hereto and made a part hereof, the facts and circumstances upon which applicant relies to establish that the public convenience and necessity require or will require the service for which application is herein made.

V. That applicant sets forth in EXHIBIT D, attached hereto and made a part hereof, facts and circumstances to show that applicant is fit, willing, and able properly to perform the service for which application is herein made and to conform to the provisions of the Motor Carrier Act, 1935, and the requirements, rules, and regulations of the Commission thereunder.

VI. That applicant has complied with the order of the Commission relative to the service of this application and of notice of the filing thereof on interested parties, as shown in EXHIBIT E, attached hereto and made a part hereof.

VII. That applicant will submit such additional information in support of this application as the Commission may require.

WHEREFORE, The applicant prays: That the Commission issue a Certificate of Public Convenience and Necessity authorizing applicant to engage in, or continue, the transportation of commodities generally with certain (State whether commodities generally, with certain exceptions, or special commodities only) exceptions, in interstate or foreign commerce, over the route or routes or within the territory herein described.

II. That applicant is a Corporation (1), doing business or proposing to do business under the trade name or style of Howard Hall Co., Inc., and that information respecting applicant is set forth in EXHIBIT A, attached hereto and made a part hereof.

III. That applicant herein applies for authority (1) to continue an operation ____ (Check), or the extension of an operation ____ (Check) as a common carrier of property in interstate or foreign commerce, which operation or extension was instituted between June 1, 1935, and October 15, 1935, inclusive; (2) to institute such an operation at a time subsequent to October 15, 1935 ____ (Check); or (3) to extend an operation for which a separate application has been filed with or certificate issued by the Interstate Commerce Commission under the Motor Carrier Act, 1935 X (Check); and that a description of the operation or extension for which authority is sought herein and of the class or classes of property transported or to be transported, is set forth in detail in EXHIBIT B, attached hereto and made a part hereof.

IV. That applicant sets forth, in EXHIBIT C, attached hereto and made a part hereof, the facts and circumstances upon which applicant relies to establish that the public convenience and necessity require or will require the service for which application is herein made.

V. That applicant sets forth in EXHIBIT D, attached hereto and made a part hereof, facts and circumstances to show that applicant is fit, willing, and able properly to perform the service for which application is herein made and to conform to the provisions of the Motor Carrier Act, 1935, and the requirements, rules, and regulations of the Commission thereunder.

VI. That applicant has complied with the order of the Commission relative to the service of this application and of notice of the filing thereof on interested parties, as shown in EXHIBIT E, attached hereto and made a part hereof.

VII. That applicant will submit such additional information in support of this application as the Commission may require.

WHEREFORE, The applicant prays: That the Commission issue a Certificate of Public Convenience and Necessity authorizing applicant to engage in, or continue, the transportation of commodities generally with certain exceptions. (State whether commodities generally with certain exceptions, or special commodities only) in interstate or foreign commerce, over the route or routes or within the territory herein described.

Dated this 28 day of October, 1939

Howard Hall Co., Inc.
(Applicant)

By Howard Hall (Title) President.

Howard Hall

OATH

STATE OF Alabama }
COUNTY OF Jefferson } ss:

Howard Hall (Name of affiant) makes oath and says that he is the President (Title of affiant) of the Howard Hall Company, Inc. (Name of applicant); that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached thereto; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Howard Hall

Subscribed and sworn to before me, a Notary Public in and for the State and County above named this 27 day of October, 1939. [SEAL]

Eugenia Seale

My commission expires March 1942

INTERSTATE COMMERCE COMMISSION RECEIVED OCT 30 1939 SECTION OF CERTIFICATES

Form B. M. C. 8

EXHIBIT B

Howard Hall Company, Inc.
(Name of applicant)

DESCRIPTION OF OPERATIONS

1. Describe the operations covered by this application as follows:

(a) *Operations over a regular route or routes and between fixed terminal:*

(1) Between ..... and ....., as follows
(Indicate furthermost points on route)

(i) From ..... to ....., via Highway .....
(Indicate furthermost points under each highway named) (Use U. S. highway number wherever applicable; otherwise, State or county highway number)

(ii) From ..... to ....., via Highway .....

(iii) From ..... to ....., via Highway .....

(iv) From ..... to ....., via Highway .....

(v) From ..... to ....., via Highway .....

(Repeat as above for each route and party thereof. See example in Note 1 on last page. Indicate in each case whether return routes correspond to those above described. If not, furnish similar description for return route. Furnish map showing each route.)

Show also, *for each route separately:*

(2) The intermediate and off-route points served or proposed to be served by applicant in connection with transportation in interstate or foreign commerce .....
(2)

.....

.....

(3) The class or classes of property transported or proposed to be transported by applicant in interstate or foreign commerce, whether (a) commodities generally, with certain exceptions,

.....
(State exceptions, either specifically or by their general nature)

.....

or, (b) special commodities .....
(State class or classes of commodities)

.....

(4) The present or proposed time schedule (attach copy and identify as Statement B-1-(a)-4).

(5) The extent, if any, to which operations covered by this application are or will be seasonal and the months of the normal operating season .....

.....

(6) The present or proposed interchange arrangements:

Point of interchange	Names and addresses of carriers with which traffic is or is to be interchanged	Interchange arrangements	
		Physical handling (6)	Rates (7)

(7) If application covers existing operations, date on which operations were instituted: .....

(8) If such operations were instituted by someone other than applicant, show by whom instituted and manner and date of applicant's acquisition of such operations. If copy of lease, agreement, court order, articles of consolidation or merger, or other evidence of applicant's acquisition of such operations. Identify as Statement B-1-(a)-8.

.....

.....

(9) If any of the operations covered by this application are conducted or are proposed to be conducted by applicant under lease or operating agreement with another, or are conducted by another under lease or operating agreement with applicant, give name and address of such other party .....

(Attach copy of such lease or agreement, identified as Statement B-1-(a)-9.) Also state whether authority to lease or contract to operate has been applied for under Section 213, Motor Carrier Act, 1935 ..... (Yes or No)

(b) *Operations solely within municipal area:*

If operations covered by this application are conducted or are proposed to be conducted solely within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, indicate the area within which such operations are conducted or proposed to be conducted and set forth all information requested in (a) (3), (5), (6), (7), (8), and (9) above.

(over)

EXHIBIT B—Concluded

(c) *Operations other than over regular routes and between fixed termini or within municipal areas:*

(1) Location of applicant's headquarters _____

(2) Place or places at which or the territory within which applicant obtains, or proposes to obtain, the main volume of its traffic. (Indicate clearly.) See attached Exhibit B - 1 (c) for full description of commodities and territory applied for herein.

(3) Place or places to which or territory within which applicant transports, or proposes to transport, such traffic. (Indicate clearly.) _____

(4) The class or classes of property transported or proposed to be transported by applicant in interstate or foreign commerce, whether (a) commodities generally, with certain exceptions,

_____
(State exceptions, either specifically or by their general nature)

or (b) special commodities _____
(State class or classes of commodities)

(5) If the answers to the preceding questions do not adequately and accurately describe the operations covered by this application, describe such operations clearly and in detail _____

(6) Furnish, in addition to the foregoing, a map clearly showing territory served or to be served. Identify as Map B-1-(c)-(6).

(7) Answer (a) (5), (6), (7), (8), and (9), so far as applicable, in an attached statement, identified as Statement B-1-(c)-(7).

(d) *Motor vehicle equipment and other facilities:*

(1) The motor vehicle equipment used or proposed to be used by applicant in the operations covered by this application is as follows:

Type	Make	Year of model	Manufacturers' rated capacity	Length	Width	Height	Type of body
(8)							

Applicant now operates 25 trucks which are registered with the Commission.

(2) If any of the equipment set forth in (1) above is not or will not be owned by applicant, give the information indicated below:

Number of units	Description of units	Name and address of owner	Basis of payment for use
(9)			

Applicant now operates 25 trucks which are registered with the Commission.

(2) If any of the equipment set forth in (1) above is not or will not be owned by applicant, give the information indicated below:

Number of units	Description of units (3)	Name and address of owner	Basis of payment for use

(a) *Description and location of other property*, except office equipment, used or proposed to be used in the performance of the transportation service covered by this application, such as dock and terminal facilities, garages, machine shops, etc.

3. If applicant holds a certificate of public convenience and necessity or a permit from the Interstate Commerce Commission or has applied for such a certificate or permit on Form B. M. C. 1, give the certificate or permit number, or the docket number of a pending application, and set forth any facts required to show the relation between the operations covered by such certificate, permit, or application and those covered by the present application.

Docket #42318. This application covers some grandfather claims and other operations instituted between June 1, 1935 and October 15, 1935.

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EXHIBIT B-1-c.

The applicant applies for authority to operate as a common carrier of commodities generally over irregular routes, as follows:

(a) Between Birmingham, Alabama and points in Alabama within a radius of 100 miles of Birmingham and points and places in the States of North Carolina, South Carolina, Georgia, Louisiana, Mississippi, all points in Florida north of and including Tampa and Lakeland and all points in Tennessee east of U.S. Highway 31, including all points on said highway.

(b) Between Birmingham, Alabama and points in Alabama within a radius of 100 miles of Birmingham and the following points:

(1) Virginia	-	All points and places therein.
(2) District of Columbia	-	All points and places therein.
(3) Maryland	-	Baltimore commercial zone, Cumberland, Hagerstown.
(4) West Virginia	-	Fairmont, Parkersburg, Mannington.
(5) Pennsylvania	-	Philadelphia commercial zone, Reading, Spring City, Norristown, Pottsville, Fleetwood, Easton, Conshohocken, Lehighton, Macungie, Denver, Red Hill.
(6) Delaware	-	Wilmington.
(7) New Jersey	-	Trenton, Newark, Marcus Hook, Kearney, Patterson, Elizabeth, Camden, Palmyra.

(4)	West Virginia	-	Fairmont, Parkersburg, Mannington.
(5)	Pennsylvania	-	Philadelphia commercial zone, Reading, Spring City, Norristown, Pottsville, Fleetwood, Easton, Conshohocken, Lehighton, Macungie, Denver, Red Hill.
(6)	Delaware	-	Wilmington.
(7)	New Jersey	-	Trenton, Newark, Marcus Hook, Kearney, Patterson, Elizabeth, Camden, Palmyra.
(8)	New York	-	New York City commercial zone.

Where specific points are named in the above application, authority is sought to serve a radius of five miles thereof.

The above application covers numerous points and places applied for in the grandfather application which has been heard before an Examiner and is now pending before Division Five of this Commission. This application is not to be construed as an admission that such applied for points are not properly included in the grandfather application. On the contrary, applicant believes that it is entitled to practically all of the points applied for in this application as a result of operations prior to June 1, 1935 or operations begun between June 1, 1935 and October 15, 1935, but this application is filed because at the time of the hearing on its grandfather application proof of certain operations was lacking, which applicant now believes can be furnished the Commission at the hearing on this application BMC-8.

EXHIBIT C

Howard Hall Company, Inc.
(Name of applicant)

PUBLIC CONVENIENCE AND NECESSITY

Set forth the facts and circumstances upon which applicant relies to establish that the service covered by this application is or will be required by the present or future public convenience and necessity, including:

1. The names and addresses of all motor carriers and all carriers by rail and water, known to applicant, with whose service the operations described in this application are or will be directly competitive.

2. The reasons, briefly and clearly stated, why the transportation service covered by this application is or will be required by the present or future public convenience and necessity.

1.

Southern Railway	Washington, D. C.
L. & N. Railway	Louisville, Ky.
Seaboard Air Line Railway	Norfolk, Va.
Federal Barge Lines	Mobile, Ala.
Pennsylvania Railroad	Philadelphia, Pa.
Jack Cole Co., Inc.	Birmingham, Ala.
Alabama Highway Express	Birmingham, Ala.
Malone Freight Lines	Birmingham, Ala.
Dixie Freight Lines	Atlanta, Georgia
United Motor Freight Terminal	Birmingham, Ala.
Georgia Motor Express	Atlanta, Georgia
Motor Terminal and Transportation Co.	Montgomery, Ala.
Southern Motor Express, Inc.	Birmingham, Ala.
Horton Motor Lines	Charlotte, N. C.
Atlantic Motor Lines	Highpoint, N. C.
Roadway Express	Akron, Ohio

2. See Attached Exhibit C-2

EXHIBIT D

QUALIFICATIONS OF APPLICANT

State the facts and circumstances upon which applicant relies to show that applicant is fit, willing, and able properly to perform the service for which application is herein made and to conform to the provisions of the Motor Carrier Act, 1935, and the requirements, rules, and regulations of the Commission thereunder, including:

1. A detailed statement of applicant's assets and liabilities on the date of this application. (Attach and identify as Statement D-1.)
2. If applicant has been engaged in motor carrier operations prior to the date of this application, furnish, if available, an income and profit and loss statement for the year or 6 months immediately preceding such date, or the period of applicant's operations, if less than 6 months. (Attach and identify as Statement D-2.)
3. A statement containing a brief description of the experience of the principal officers and operating personnel of applicant's present or proposed organization. (Attach and identify as Statement D-3.)
4. Any other facts relevant to the ability of applicant properly to perform the service covered by this application:

EXHIBIT E

CERTIFICATE OF SERVICE

I, Howard Hall (Name of affiant), President (Title of affiant), of the applicant, do hereby certify that upon the 2 day of May, 1939, I served the foregoing application upon the Boards, Commissions, or officials (or the Governor with whom such Board, Commission, or official) of the States of Ga., Ala., Fla., N.C., S.C., Tenn., Va., W. Va., D.C., Del., Pa., N.J., N.Y., Md. in which States applicant operates or proposes to operate, by delivering in person or by registered mail, a true, correct, and complete copy of this application to each thereof at the following addresses:

INTERSTATE COMMERCE COMMISSION RECEIVED MAY 2 1939 CERTIFICATES

(Name of Board)	(Address)
See Attached Exhibit E	

I FURTHER CERTIFY that I served a notice of the filing of this application, as required by Form B. M. C. 15, by delivering in person or by registered mail a copy thereof to each of the carriers named in answer to item 1 of EXHIBIT C of this application.

Howard Hall
(Applicant)

D-1-39

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[fol. 226] EXHIBIT E

Alabama Public Service Commission, Montgomery, Alabama.

Mississippi Railroad Commission, Jackson, Mississippi.

Louisiana Public Service Commission, Baton Rouge, Louisiana.

Florida Railroad Commission, Tallahassee, Florida.

Georgia Public Service Commission, Atlanta, Georgia.

Tennessee Railroad and Public Utilities Commission, Nashville, Tennessee.

North Carolina Utilities Commission, Raleigh, North Carolina.

South Carolina Public Service Commission, Columbia, South Carolina.

Virginia State Corporation Commission, Richmond, Virginia.

West Virginia Public Service Commission, Charleston, West Virginia.

Maryland Public Service Commission, Baltimore, Maryland.

Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania.

District of Columbia Public Utilities Commission, Washington, D. C.

New Jersey Board of Public Utility Commissioners, Trenton, New Jersey.

New York Public Service Commission, Albany, New York.

Governor of Delaware, Dover, Delaware.

[fol. 227] EXHIBIT C-2

As heretofore set out in Exhibit B-1-c, applicant believes that it is entitled to a large number of the rights sought for in this application because of operations conducted prior to June 1, 1935 or between June 1, 1935 and October 15, 1935, but its grandfather case has now been heard and is pending before Division Five and because of lack of proof in that hearing applicant files this application to substantiate the rights contended for herein.

Applicant has been engaged in operations as an irregular common carrier since 1934 and has rendered extensive service to the shippers of Birmingham and those located within 100 mile radius thereof. By operating to such points as applied for herein, applicant can give direct and expedited

service to the shippers of the territory which can not be given by the regular route common carriers due to the fact that practically all the points applied for are not served directly by any one carrier but would have to be served by several connecting common carriers over irregular routes. Some points applied for have no truck service whatsoever.

[fol. 228]

EXHIBIT D-1

Howard Hall Company, Inc.
Birmingham, Alabama

Balance Sheet
As at June 30th, 1939

Assets

Current			
Cash in Bank			$14,599.92
Cash in Office			335.82
Total Cash			14,935.74
Revenue Accounts Receivable		$8,294.61	
Employees Accounts Receivable		119.32	
Due from Tire Store		649.09	
Total Accounts Receivable			9,063.02
Total Current Assets			23,998.76
Fixed			
Truck equipment	$31,080.10		
Less: Reverse for Depreciation	18,875.59		
		12,204.51	
Trailer equipment	14,637.83		
Less: Reverse for Depreciation	7,502.51		
		7,135.32	
Office and shop equipment	185.00		
Less: Reserve for Depreciation	10.00		
		175.00	
Automobiles	1,505.22		
Less: Reserve for Depreciation	581.08		
		924.14	
Total Fixed Assets			20,438.97
Deferred and Prepaid Items			1,459.96
Total Assets			$45,897.69

Liabilities

Current			
Equipment Lien Notes Payable			$1,594.08
Miscellaneous Accounts Payable			5,031.62
Accrued Capital Stock Tax			90.00
Accrued Taxes			722.96
Total Current Liabilities			7,438.66
Capital and Surplus			
Capital Stock Issued		2,000.00	
Paid in Surplus		1,294.51	
Earned Surplus less Dividends		35,164.52	
Total Capital and Surplus			38,459.03
Total Liabilities			$45,897.69

[fol. 229] EXHIBIT D-3

Howard Hall, President and General Manager of Howard Hall Company, Inc., has been engaged as a common carrier over irregular routes since early 1934 and since that time has steadily increased the profits of the company. He is thoroughly familiar with the irregular route common carrier type of business, as his balance sheet indicates.

[fol. 230] BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of Howard Hall Company, Inc.

Docket No. 42318, Sub. 1

Comes Now Howard Hall Company, Inc., applicant in the above styled docket, and files this its petition for amendment to its application for extension heretofore filed on Form BMC-8 and for petition respectfully says:

1

On October 30, 1939 applicant filed an application for extension of its operations. This application covered operations which were begun prior to June 1, 1935 and operations instituted between June 1, 1935 and October 15, 1935 and also some new operations. The application for the operation instituted prior to October 15, 1935 was applied for as a precautionary measure because applicant feared it had not submitted sufficient evidence of these operations in the hearing on its grandfather application but that applicant now was in a position to produce additional evidence in connection with these operations.

2

Through oversight, applicant failed to include in its grandfather application and the application for extension heretofore filed on October 30, 1939 a request for operating authority between Mobile, Alabama on the one hand and Montgomery and Birmingham, Alabama on the other. Applicant claims to have conducted such operations prior to [fol. 231] June 1, 1935 but wishes to include application for this territory in its present application for an extension.

3

Applicant requests authority to amend Exhibit B-1-c of its application filed on October 30, 1939 so as to include the following paragraph, which should follow paragraph (b) thereof:

(c) Between Mobile, Alabama on the one hand and Montgomery and Birmingham, Alabama on the other.

Wherefore, applicant prays that said amendment be allowed and be made a part of its application on Form BMC-8 heretofore filed on October 30, 1939.

Allan Watkins, Attorney for the Applicant.

Post Office Address: 1403 Citizens & Southern National Bank Building, Atlanta, Georgia.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before the undersigned officer, duly authorized to administer oaths, Howard Hall, who, after being duly sworn deposes and says that he is the president of Howard Hall Company, Inc. and that he is authorized on the part of said corporation to verify and file with the Interstate Commerce Commission this amendment to its application; that he has carefully examined all statements contained in such amendment and that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and [fol. 232] correct to the best of his knowledge, information and belief.

Howard Hall.

Sworn to and subscribed before me this 11th day of January, 1940. Lucille H. Printup, Notary Public, Georgia, State at Large.

Certificate of Service

I hereby certify that I have served a copy of this amendment by mailing copy of the same to all carriers set forth in Exhibit C-1 of the application heretofore filed and have also served copy of the same upon all Boards or Commissioners of the states set forth in Exhibit E of the application heretofore filed.

Allan Watkins, Attorney for Howard Hall Company, Inc.

[fol. 233] This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-42318 (Sub-No. 1)

HOWARD HALL COMPANY, INC., EASTERN TERRITORY EXTENSION

Submitted September 20, 1940. Decided January 3, 1941

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of marble from Gantts Quarry, Ala., to points in North Carolina, South Carolina, Virginia, New Jersey, Florida, Pennsylvania, New York, Maryland, Delaware, and the District of Columbia, over irregular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions and application denied in all other respects.

Allan Watkins and *Edgar Watkins* for *applicant.*

James B. Smiley, Jr., Frank X. Masterson, J. D. Lawson, Frank D. Hollifield, John M. Miller, C. E. Walker, J. W. Coker, D. H. Bagley, J. F. Kirkman, Chas. B. Skimerton, L. C. Adcock, J. N. Ogden, William C. Burger and *James W. Wrape* for protestants.

Report of the Commission

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

Exceptions were filed by applicant and protestants to the order recommended by the examiner, and a motor carrier protestant and certain rail protestants replied to those of applicant. Our conclusions differ somewhat from those recommended.

By application filed October 30, 1939, as amended, Howard Hall Company, Inc., of Birmingham, Ala., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with cer-

tain exceptions, between Birmingham and points within 100 miles thereof, on the one hand, and, on the other, all points in Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Virginia, District of Columbia, those in Florida north of and including Tampa and Lakeland, those in Tennessee on and east of U. S. Highway 31, and certain specified points in Delaware, Maryland, New Jersey, New York, and Pennsylvania, and also between Mobile, Ala., on the one hand, and Birmingham and Montgomery, Ala., on the other; all over irregular routes. Motor and rail carriers operating in the same general territory oppose the application.

In *Howard Hall Co., Inc., Common Carrier Application*, 24 M. C. C. 273, we found that applicant was on June 1, 1935, and continuously since that time had been, in bona fide operation as a common carrier by motor vehicle, over [fol. 234] irregular routes, of (a) general commodities, with certain exceptions, between Birmingham and points within 10 miles thereof, on the one hand, and, on the other, all points in Georgia, Mississippi, North Carolina, South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 192 to Melbourne, and (b) specified commodities, from and to certain points in Alabama, Louisiana, Ohio, Tennessee, and West Virginia. By the instant application, authority is sought to operate from or to a 100 mile area around Birmingham in lieu of the authorized 10 mile area, and, in addition, to enlarge the territorial scope to embrace the territory outlined in the preceding paragraph.

Applicant operates 26 complete units of equipment, consisting of tractors and trailers, and closed and open type vans, some of which are 30 feet in length. It now serves many of the points included herein, presumably on the basis that operations to such points were instituted during the so-called interim period. Though this application was filed subsequent to February 12, 1936, applicant's timely filed "grandfather" application covered all of the territory included herein. Accordingly, it might be said that the instant application is, in effect, an amendment on a proper form of the timely filed "grandfather" application. Such operations as were commended during such period, i. e., between June 2, 1935, and October 15, 1935, both inclusive,

and which have been conducted continuously since have therefore been lawful.

In support of its application, applicant relies mainly on four exhibits covering transportation performed by it between the various points included herein. In some instances, these exhibits show shipments transported on or before June 1, 1935, but since applicant's "grandfather" rights, as stated above, have been decided,[1] no consideration will be given herein to any shipments transported on or prior to June 1, 1935, nor to any shipments moving between points authorized in such other proceeding.

During the interim period, i. e., between June 2, 1935, and October 15, 1935, inclusive, applicant transported three shipments of rugs from Wilmington, Del., to Birmingham, but did not serve any point in Delaware from the fall of 1935 until the fall of 1936. As to Georgia, one shipment of sugar was transported from each of the points of Port Wentworth and Savannah, Ga., to Montgomery, Ala., one shipment of furniture from Tarrant City., Ala., to Athens, Ga., and one shipment of felt from Fairfield, Ala., to Reidsville, Ga., but no points in Georgia were served in 1936. Applicant also transported one shipment of tomatoes from Baltimore, Md., to Birmingham; two shipments of paper bags from Pascagoula, Miss., to Montgomery; one shipment of scrap tires from Birmingham to Trenton, N. J.; five shipments of tires and tubes from Trenton to Birmingham, and one shipment of furniture from Birmingham to Pal-
[fol. 235] myra, N. J.; three shipments of butter between New York City, N. Y., and Birmingham; one shipment of pianos from New York City to Birmingham; and two shipments of furniture between Birmingham and New York City; two shipments of cotton yarn from Sylacauga, Ala., to Swannanoa, N. C.; two shipments of paper from Hartsville, S. C., to Selma, Ala.; and one shipment from each of the points of Front Royal, Richmond, Suffolk, and Winchester, Va., to Birmingham, consisting of apple butter, tile, peanuts, and apple sauce, respectively, and nine shipments of cloth from Danville, Va., to Birmingham. In respect of Tennessee, applicant transported four shipments of cotton yarn from Sylacauga, one to Knoxville, Tenn., and

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[1] Applicant has filed a petition for reconsideration in No. MC-42318 and the effective date of the denial order in that case has been postponed.

the other three to Chattanooga, Tenn., but there was only one shipment to or from Tennessee points in 1936.

Applicant also transported, during the interim period, a total of approximately 72 shipments from or to points in Pennsylvania consisting of 31 of cotton yarn, 10 of springs, nine of cloth, eight of batteries, four each of cotton cones and oil, two each of radios and cleaning compound, and one each of jelly and laundry supplies. Forty-eight of these shipments moved to or from Philadelphia and Reading, Pa., with the remainder, consisting of from one to six shipments each, moving to or from Denver, Fleetwood, Gaston, Lehighton, Macungie, Norristown, Pittsburgh, Pittsville, Red Hill, and Spring City, Pa. Twenty-seven originated at or were destined to Birmingham, 23 to Sycamore, Ala., 18 to Sylacauga, three to Jacksonville, Ala., and one to Gadsden, Ala.

As stated, applicant requests authority to transport general commodities, over irregular routes, throughout a large territory, and has predicated its case principally on the exhibits which, to the extent that they show operations during the interim period, are discussed above. Applicant contends that it has always held itself out to transport general commodities between the points included herein, and that it should be authorized so to operate. Under the provisions of the Interstate Commerce Act, however, we have no power to grant a certificate covering the authority sought by applicant except upon evidence that the service in question is or will be required by the present or future public convenience and necessity and that applicant is fit, willing, and able properly to perform such service. Although no one questions applicant's fitness to perform the proposed operation, protestants contend that public convenience and necessity do not require it.

If we assume that the transportation of the various commodities set forth above would bring applicant's operations within the category of a general commodity hauler, then certainly authority so extensive as that here sought could be granted only on a most substantial showing of public convenience and necessity. To do otherwise would create the very ills which regulation is designed to alleviate. The evidence concerning applicant's past operations wholly fails to establish a need for its services in the transportation of general commodities in the large area claimed. Indeed, it fails to indicate a continuing need or demand for

applicant's service with respect to even specific commodities, for the reason that of the commodities transported [fol. 236] during the interim period, the only commodity transported continuously since that time has been springs from Philadelphia to Birmingham. Applicant, to a large extent, has changed the territory served and the commodities transported from time to time. For example, during 1937, applicant began transporting mayonnaise in large quantities from Jacksonville, Fla., to various points in Alabama; flavoring syrup from Birmingham to points other than those authorized in its "grandfather" proceeding; and canned goods from points in Tennessee to destinations in Alabama. In our opinion, it is necessary, therefore, to rely almost entirely on the testimony of the shipper witnesses concerning the need, if any, for applicant's services.

Four shippers' witnesses testified in support of applicant's proposed operation. A manufacturer of felt base rugs has been using applicant's service from Wilmington to Birmingham since October 1936. It also used such service to Montgomery but had not shipped to that point in over a year prior to the hearing. Before this company used applicant's service, shipments were made by water to Mobile, thence by truck, but because of delay and damage to merchandise, the change was made to applicant. No other motor carrier has been used from Wilmington because applicant's service has been completely satisfactory. By the use of applicant's service, an order can be mailed on a Saturday, the rugs are picked up on a Monday or Tuesday, and delivered on Thursday or Friday. Expedited service is needed to keep a balanced stock on hand. Shipments are made two to four times a month and in quantities of at least 16,000 pounds. This shipper, however, has never inquired as to whether it can get the same service from other carriers.

A manufacturer of tires and tubes at Conshohocken, Pa., has used applicant's service in the transportation of tires and tubes from Conshohocken to Birmingham since the fall of 1936, and in the transportation of tire fabric from West Boylston, Ala., to Conshohocken, apparently since 1939. Applicant's service has been satisfactory, but this witness stated that the principal reason for using such service is that applicant's president is financially interested in the manufacturer's tire distributorship at Birmingham.

Applicant has transported marble, in shipments of 12,000 pounds or more, from Gantt's Quarry, Ala., near Sylacauga, to various points in the territory for the past two or three years. This marble is used in the interior of buildings, is of "thin stock", and is easily subject to breakage. Less-than-truckload shipments are specially packed and are handled satisfactorily by regular route common carriers. When transported in truckload and carload quantities, the marble is packed in "A" frames and braced in the trucks or cars. A truckload of 12,000 pounds packed in the same manner as for less-than-truckload shipments would cost $50 to $100 more than packed for truckload movement. Shipments are made to practically all points where construction is in progress, but are not made regularly to any one point. This shipper stated he had a need for applicant's services to points in Delaware, Florida, Louisiana, Maryland, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Virginia, and the District of Columbia.

[fol. 237] Applicant also has served a manufacturer of flavoring syrup for the past three years. Shipments are usually in truckloads weighing 15,000 pounds or more and are transported from Birmingham to eastern points. The witness for this shipper expressed the opinion that when shipments of syrup in barrels are interchanged, there is a possibility of damage to the barrels causing them to leak. Contents of a leaking barrel cannot be used until analyzed due to possible contamination. At the present time, the shipper also uses rail and other motor carriers, but prefers applicant's service allegedly because it is better and results in fewer damage claims.

Representatives of five protestant motor carriers testified as to the service rendered by their respective companies and, in addition, protestants also introduced in evidence an exhibit showing motor carriers serving, either directly or through interchange, Birmingham, Montgomery, and the other principal points in the territory included in this application.

One protestant operates a regular daily schedule between Atlanta, Birmingham and Montgomery, interchanging at Birmingham for Louisiana and Mississippi points and at Atlanta for northern points. This carrier transports freight for the flavoring syrup manufacturer mentioned above; receives regular shipments of rugs in truckloads

at Atlanta, apparently through interchange, destined to Birmingham and Montgomery; gives third morning delivery out of Baltimore, Philadelphia, and New York City; and operates a number of pieces of equipment empty out of Birmingham and Montgomery because outbound tonnage from those points is less than that inbound. Some of the other protestants, one of which now transports marble in less-than-truckload lots from Sylacauga to points served by it on its regular route for the same shipper that applicant serves, propose by the interchange of trailers to transport marble in truckload lots to points in Louisiana and Mississippi as well as to points not included in this application.

From the foregoing, it is apparent that there is no convincing evidence that public convenience and necessity require applicant's operation in the transportation of any commodity with the possible exception of marble. Certainly there has been no showing as to a need for the transportation of general commodities. In respect of the transportation of rugs it should be noted that at least one motor carrier protestant is providing reasonably adequate service to Birmingham and Montgomery; that such carrier transports rugs; and that the shipper desiring applicant's service in the transportation of such commodity has never inquired as to whether it can get the same service from other trucking companies although the witness for this shipper stated that, if other carriers could give the same service as applicant, it would be sufficient. As to shipments of flavoring syrup, applicant has served Wilmington, Del., Baltimore, Md., and Lynchburg, Norfolk, Roanoke, Richmond, and Winchester Va., but the shipper is not sure that it needs applicant's service to Wilmington; rail service is satisfactory. This shipper also uses other carriers to points south of Wilmington, which service on less-than-truckload shipments has been satisfactory. However, as to the transportation of marble, there is no showing that protestants can or have provided reasonably satisfactory [fol. 238] service except to points in Louisiana and, although the application does not cover all points in certain States, we will consider it amended to include all such points, as the shipper testified that he never knew where a construction job would be and that he shipped to all construction jobs.

The burden of proof, of course, is upon applicant to show affirmatively that the proposed operation will serve a useful public purpose responsive to a public demand or need and that the public need cannot or will not be met as well by existing carriers. This, except in respect of the transportation of marble, applicant has failed to do. We have consistently found that existing carriers are entitled to handle the traffic available unless it is shown that there is a deficiency in the existing service. Existing carriers with established rights to serve points in this territory operate, it is true, principally over regular routes, but, as we heretofore have stated on numerous occasions, such regular route carriers are expected to maintain regular service for the movement of freight in whatever quantities offered and they cannot operate economically and efficiently if applicant or other carriers are permitted to invade such routes for the sole purpose of "handling the cream of the traffic available thereon in so-called irregular-route service." Accordingly, this application, with the one exception mentioned above, must be denied.

We find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle of marble, in interstate or foreign commerce, from Gantt's Quarry, Ala. (near Sylacauga, Ala.), to points in North Carolina, South Carolina, New Jersey, Virginia, Florida, Pennsylvania, New York, Maryland, Delaware and the District of Columbia over irregular routes; that applicant is fit, willing, and able properly to perform such service and to conform to the provisions of the act and our rules and regulations thereunder; that a certificate authorizing such operations should be issued; that in all other respects the application should be denied; and that applicant should be required to cease and desist from any and all such operations as were instituted between June 2, 1935, and October 15, 1935, inclusive.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein and requiring applicant to cease and desist from all operations embraced in this application except to the extent authorized.

Commissioner Lee did not participate in the disposition of this proceeding.

[fol. 239] Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 3rd day of January, A. D. 1941.

No. MC-42318 (Sub.-No. 1)

Howard Hall Company, Inc.,
Eastern Territory Extension

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied effective March 3, 1941.

And it is further ordered, That applicant be, and it is hereby, notified and required to cease and desist on or before March 3, 1941, from all operations under the said application, No. MC-42318 (Sub-No. 1), as a motor carrier, in interstate or foreign commerce, instituted between June 2, 1935, and October 15, 1935, inclusive, except to the extent authorized in said report.

By the Commission, division 5.

W. P. Bartel, Secretary.

[fol. 240] Copy

In the District Court of the United States for the Northern District of Alabama, Southern Division

Civil Action. No. 5215

Howard Hall Company, Inc., Plaintiff,

vs.

United States of America and Interstate Commerce Commission, Defendants

Before McCord, Circuit Judge, and Kennamer and Murphree, District Judges

Opinion—Filed April 17, 1941

McCord, Circuit Judge:

The petitioner, Howard Hall Company, Inc., is an Alabama corporation operating as a motor carrier with offices

and principal place of business in Birmingham, Alabama. On February 11, 1936, it filed application with the Interstate Commerce Commission for a certificate of public convenience and necessity under the "grandfather clause" of Section 206(a) of the Motor Carrier Act of 1935, 49 U. S. C. A. § 306 (a).

The carrier sought a certificate authorizing "continuance of operation in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson."

The application was filed and docketed by the Interstate Commerce Commission and a hearing was held before a trial examiner on February 15, 1937. Rail and motor carriers appeared in opposition to the application. At this first hearing the application was amended by eliminating therefrom all points in Wisconsin, Texas, Arkansas, Kansas, Missouri, and points in Florida south of Tampa and Lakeland, and [fol. 241] points north of Chicago. The Examiner issued a recommended report and order on May 13, 1937, but, on motion of Howard Hall Company, Inc., the report was withdrawn and a further hearing set for August 20, 1937. After the second hearing and on November 30, 1937, the Examiner issued his report and order recommending that certain rights be granted to the applicant. Exceptions to the report were filed by the carrier, and on July 10, 1940, Division 5 of the Interstate Commerce Commission handed down its report and decision in the case. It found that the applicant had not served "enough representative points in all the states claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application." After reviewing the evidence before it the Commission further found that the applicant "on June 1, 1935, and continuously since that time, has been, in *bona fide* operation, in interstate or foreign

commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, * * *, between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on the north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 92 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Chattanooga and Birmingham; all over irregular routes; that by reason of such operation it is entitled to a certificate authorizing the continuance thereof; and that the application in all other respects should be denied." Howard Hall Co., Inc., Common Carrier Application, 24 M. C. C. 273.

The order entered pursuant to the decision was to become effective on August 31, 1940, but the carrier filed application for rehearing and redetermination, and the Commis-[fol. 242] sion from time to time postponed the effective date of the order until February 3, 1941, when a final order of denial was entered. Thereafter, on February 28, 1941, under the provisions of 28 U. S. C. A. §§ 41 (28) 43-48, Howard Hall Company, Inc., filed petition in this court to enjoin, set aside, and render ineffective that portion of the Commission's order which denied part of its application for a "grandfather" certificate. The Interstate Commerce Commission intervened as a party defendant under the provision of 28 U. S. C. A. § 43(a). A court of three judges was convened as required by statute, 28 U. S. C. A., § 47, and a hearing was held in Birmingham on April 14, 1941.

By stipulation and agreement of the parties and their respective counsel all issues presented by the petition are to be disposed of in this one proceeding and the case is, therefore, to be now decided upon its merits:

In a court review of an order of the Interstate Commerce Commission the range of issues is narrow. We are confined to a determination of whether or not the Commission's order violates the Constitution, exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. Of such cases

the Supreme Court recently said, "Only questions affecting constitutional power, statutory authority, and the basic prerequisities of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." Rochester Telephone Corp. v. United States, 307 U. S. 125; United States v. Maher, 307 U. S. 148; I. C. C. v. Ill. Cent. R. Co., 215 U. S. 452; Commerce, 11 Am. Jur. §§ 172-174, p. 142, et seq.; Commerce, 15 C. J. S. § 148, p. 554, et seq.

Under the "grandfather clause" of the Motor Carrier Act the applicant, to be entitled to a certificate of public convenience and necessity, must have been engaged in "*bona fide*" operation as a motor carrier on June 1, 1935, "over the route or routes or within the territory for which application is made and has so operated since that time." In the determination of this fact question the weight of the evidence is for the Commission and not for the court. Lov- [fol. 243] ing, et al. v. United States, 32 F. Supp. 464, affirmed 310 U. S. 609; Eastern Carrier Corp. v. United States, 31 F. Supp. 232, affirmed U. S., 60 S. Ct. 898; Philadelphia-Detroit Lines v. United States, 31 F. Supp. 188.

The petitioner recognizes the above stated principles but contends that the Commission erred as a matter of law in four particulars.

It is first contended that although the Commission received evidence of operations for the "interim" period from June 1, 1935, to October 15, 1935, that it gave no consideration to such evidence, and that it erred in refusing to make a finding and grant a certificate under the provision of the "interim" section, Section 206(b), 49 U. S. C. A. § 306(b). The Commission received evidence of the "interim" operations of the petitioner and it will not be presumed that it failed to give due consideration to such evidence in passing upon the application for "grandfather" rights. Moreover, it appears that on October 30, 1939, Howard Hall Company, Inc., filed a separate application with the Commission for authority to operate under the provisions of Section 206(b), and that after a hearing the Commission issued a certificate of public convenience and necessity authorizing the carrier to carry on certain operations. No. Mc-42318 (sub-No. 1) Interstate Commerce Commission. There is no merit in the contention that other rights under Section 206(b) should be granted under this petitioner's "grandfather" application.

The petitioner's present contention is but an attempt to retry issues already heard and determined by the Commission in another proceeding.

The petitioner's second contention is that there was evidence and a finding that there had been 55 movements of freight to and from an area within 100 miles of Birmingham prior to June 1, 1935, and 270 movements in the area thereafter, and that the Commission, therefore, erred as a matter of law in limiting operations "between Birmingham, Alabama, and all points within 10 miles thereof", and that the area should have been "within 100 miles of Birmingham". As to movements of freight in the 100 mile area the Commission found that of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, and that only 55 moved from points within 100 miles of Birming-
[fol. 244] ham, and that only "12 points were served in this comparatively large territory surrounding applicant's headquarters in Birmingham." Of 2,550 shipments transported after June 1, 1935, only 270 moved to or from 100 miles of Birmingham. The evidence of shipments within the 100 mile area claimed by the petitioner did not show substantial, *bona fide* operations of sufficient regularity to require the issuance of a certificate under the "grandfather clause" authorizing free lance operation in this large territory. In limiting the applicant's operations to and from Birmingham to a ten mile zone beyond the city limits of Birmingham the Commission acted within its authority and not capriciously or arbitrarily.

The petitioner further contends that the Commission had no right to consider evidence of continuous operations beyond the date of the filing of the "grandfather" application. There is no merit in this contention. Those who seek "grandfather" rights under Section 206(a) must establish not only that they were in *bona fide* operation on June 1, 1935, but also that such operations were carried on continuously "since that time". In other cases, as here, the Commission has consistently refused to determine the rights of an applicant as of the date of the filing of the application, and has held that the requirement of continuity of operations is not dispensed with when the application for a "grandfather" application is filed. The words of the statute, "since that time", may not be limited and construed to mean "since that time and until the filing of an application". Evidence

of activities of the petitioner subsequent to the filing of the application was properly received and considered by the Commission. United States v. Maher, 307 U. S. 148, 155; Gregg Cartage & Storage Co. v. United States, et al., D. C., N. D. of Ohio, recently decided, — F. Supp.—; Atlantic Motor Exp., Inc., Common Carrier Application, 12 M. C. C. 576, 579-580.

The petitioner's final contention is that the Commission was without authority to limit certain of its operations to the transportation of specified commodities between designated points. Upon the evidence before it the Commission found that:

[fol. 245] 1. "• • • prior to and since June 1, 1935, applicant has held itself out to transport general commodities, with certain exceptions, between Birmingham and vicinity, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those points in Florida north of and including Tampa and Lakeland, and has actually conducted an operation consistent with such holding out."

2. "In addition the record shows that, prior to and since June 1, 1935, the applicant transported paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; cloth from Alabama City, Ala., to Wheeling, W. Va.; and matches from Wheeling to Chattanooga and Birmingham."

Consistent with the first finding above quoted the Commission granted general authority to transport commodities in the territories there named. In accordance with the second finding the Commission limited the Applicant's authority to the territory and points named and the commodities listed. Applicant was thereby granted authority, both general and limited, to carry on virtually every substantial operation in which it had been engaged when the "grandfather clause" became effective. Under the facts and circumstances of the case this limitation upon the carrier's authority was just and equitable, and in so holding the Commission acted clearly within its province. Loving, et al. v. United States, 32 F. Supp. 464, affirmed 310 U. S. 609; Eastern Carrier Corp. v. United States, 31 F. Supp. 232,

affirmed 60 S. Ct. 898; Cf. Carolina Freight Carriers Corp. v. United States, D. C. of W. D. of N. C., decided April 5, 1941, — F. Supp. —.

On the record before us, which includes a transcript of the evidence before the Commission and a copy of the exhibits, we are of opinion and so hold that the evidence justified the order which was entered. The findings and holdings of the Commission are supported by the evidence, are not arbitrary or capricious, and will not be disturbed.

This court finds no reason to set aside, annul, or suspend the order of the Commission. The complaint is without merit and is hereby.

Dismissed.

Done this 17th day of April, 1941.

Leon McCord, United States Circuit Judge. C. B. [fol. 246] Kennamer, United States District Judge. T. A. Murphree, United States District Judge.

[fol. 247] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

Findings of Fact and Conclusions of Law—Filed May 26, 1941

FINDINGS OF FACT

The Court makes the following findings of fact:

1. Plaintiff is a corporation organized and existing under the laws of the State of Alabama and as such is engaged as a common carrier by motor vehicle in interstate commerce.

2. Plaintiff was engaged in the business of a common carrier by motor vehicle in interstate commerce on and prior to June 1, 1935. On February 11, 1936, it filed application with the Interstate Commerce Commission for certificate of public convenience and necessity under the "grandfather" clause of section 206(a) of the Motor Carrier Act of 1935, seeking a certificate authorizing continuance of its operation claiming such rights as a common carrier of general commodities between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Ar-

kansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, and the District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson. The application was amended during the Commission hearings to eliminate therefrom all points in Wisconsin, Texas, Arkansas, Kansas, Missouri, and points in Florida south of Tampa and [fol. 248] Lakeland, and points north of Chicago.

3. The application was filed and docketed by the Interstate Commerce Commission and formal hearings were held on February 15, 1937 and on August 20, 1937. Other parties appeared as protestants. Following the filing of reports and recommendations of the hearing examiners, Division 5 of the Interstate Commerce Commission made and entered its report and order on July 10, 1940, to the effect that the applicant had not served "enough representative points in all the states claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application." The decision and report of the Commission decided that the applicant was "on June 1, 1935, and continuously since that time, has been, in *bona fide* operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, • • •, between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 92 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Chattanooga and Birmingham; all over irregular routes;" and that by reason of such operation was entitled to a certificate authorizing the continuance of that operation, and that the application in all other respects should be denied.

The order entered with the report was made effective on August 31, 1940, but was by the Commission extended to February 3, 1941. Complaint was filed herein February 28, 1941, seeking to enjoin, set aside, and render ineffective that portion of the Commission's report and order which denied part of the application for a "grandfather" certificate. The Interstate Commerce Commission intervened as a party defendant and at a hearing held in Birmingham, Ala., on April 14, 1941, before a court of three judges, counsel for all parties stipulated and agreed upon submission of the case for decision upon its merits.

[fol. 249] 4. The Commission received evidence of the "interim" operations of plaintiff between June 1, 1935, and October 15, 1935, and it will not be presumed that it failed to give due consideration to such evidence in connection with the application for "grandfather" rights. Plaintiff, on October 30, 1939, filed a separate application with the Commission for authority to operate under provisions of section 206(b), and after hearing the Commission issued a certificate authorizing it to carry on certain operations.

5. As to plaintiff's second contention the evidence shows, as was stated in the Commission's decision and report, that prior to June 1, 1935, the plaintiff had moved 55 shipments of freight to and from an area within 100 miles of Birmingham, and of a total of 1,000 shipments there were 875 to or from the City of Birmingham, and of the 55 shipments within the 100 miles of Birmingham only 12 points were served in the comparatively large territory surrounding its headquarters in Birmingham; that since June 1, 1935, out of 2,550 shipments only 270 moved from the area within 100 miles of Birmingham.

6. The Commission did consider evidence of plaintiff's operations from prior to June 1, 1935, up to the date of decision and report, or up to the date of the final hearing.

7. The Commission's decision and report limited the authority granted as to certain named points and territory and with respect to certain commodities as listed.

Conclusions of Law

And the Court sets forth the following as its conclusions of law:

1. The report, findings, and holdings of the Commission are justified and supported by the evidence, are not arbitrary or capricious.

2. The plaintiff was not engaged in "bona fide" operation as a motor carrier on June 1, 1935, and since that time as claimed in its application within the provisions of section 206(a) of the Motor Carrier Act of 1935, and was so engaged only as to the territory and commodities named, listed, and approved in the Commission's report and decision of July 10, 1940.

[fol. 250] 3. Evidence of "interim" operations of plaintiff between June 1, 1935, and October 15, 1935, as applicable under the provisions of section 206(b) of the Motor Carrier Act of 1935, create no additional rights under the provisions of section 206(a) and will properly be considered as a part of the evidence under the application for "grandfather" rights. There is no merit in the contention that other rights under section 206(b) should be granted under plaintiff's "grandfather" application.

4. The evidence of shipments within the 100-mile area adjoining the City of Birmingham, Ala., as claimed by the plaintiff did not show substantial "bona fide" operations of sufficient regularity to require the issuance of a certificate under the "grandfather" clause authorizing free-lance operation in this large territory, and the report and decision of the Commission which limited operations to a 10-mile zone beyond the city limits of Birmingham, Ala., were within its authority and not arbitrary and capricious.

5. The provision of the Motor Carrier Act of 1935 with reference to "grandfather" rights under section 206(a), requiring evidence of "bona fide" operation on June 1, 1935, and "since that time" does not limit Commission consideration of evidence of continuous operations to a period of time prior to the filing of the application, and evidence of activities subsequent thereto as considered by the Commission was lawful and proper as provided for under section 206(a).

6. The limitation upon applicant's authority, as granted by the Commission, to certain named commodities as to a part of the territory and points therein was justified by the evidence showing that it covered virtually every substantial operation in which it had been engaged under the provisions of section 206(a), was just and equitable and clearly within the authority of the Commission.

7. Plaintiff's complaint herein should be dismissed.

Leon McCord, United States Circuit Judge. C. B. Kennamer, United States District Judge. T. A. Murphree, U. S. District Judge.

[fol. 251] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Civil Action. No. 5215

HOWARD HALL COMPANY, INC., Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

DECREE—Filed May 26, 1941

The above-entitled action, brought under 28 U. S. C. A. 41 (28) to enjoin and set aside an order of the Interstate Commerce Commission at Birmingham, Ala., on April 14, 1941, and having been submitted upon the hearing for final decree, and the Court having filed its findings of fact and conclusions of law which are by reference made a part hereof; Now, therefore, for the reasons set forth in the written opinion filed herewith,

It is ordered, adjudged and decreed that plaintiff's complaint herein be and the same is hereby dismissed.

Leon McCord, United States Circuit Judge. C. B. Kennamer, United States District Judge. T. A. Murphree, United States District Judge.

April 17, 1941.

[fol. 252] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1941

[Title omitted]

ASSIGNMENTS OF ERROR—Filed May 2, 1941

The Appellant, Howard Hall Company, Inc., assigns the following errors in the record and proceedings in this cause:

1

The District Court, composed of three judges, erred as a matter of law in affirming the decision of the Commission of July 10, 1940, which denied part of appellant's application before said Commission, and in refusing to set aside said order, because as a matter of law it was the duty of the Commission to consider the evidence introduced by appellant before the Commission of operations between June 1, 1935 and October 15, 1935 in accordance with the provisions of Section 206 (b) of the Motor Carrier Act, 49 Stat. 551, 52 Stat. 1238. The District Court erred in affirming the decision of the Commission in which the Commission refused to consider said evidence and failed to make a finding thereon.

2

The District Court erred as a matter of law in affirming the decision of the Commission, because the Commission, in its decision, specifically found that appellant had transported 55 movements of freight to and from points within [fol. 253] 100 miles of Birmingham, Alabama, prior to June 1, 1935 but limited the authority granted appellant to Birmingham, Alabama and a radius of ten miles thereof. As a matter of law, under Section 206 (a) of the Motor Carrier Act, the Commission was bound to grant authority in accordance with the undisputed evidence of operations prior to June 1, 1935 (52 Stat. 1238), to-wit: At least from Birmingham and 100-mile radius thereof. Failure to set aside said order which limited the authority of applicant to ten miles of Birmingham was error.

3

The District Court erred as a matter of law in affirming the decision of the Interstate Commerce Commission where-

in said Commission limited the operating rights of appellant under its application to the transportation of particular commodities over certain routes and within certain territories, because as a matter of law the Commission had no authority to place any limitation on the operating rights of the appellant with respect to the commodities transported. Under Section 206 (a) of the Motor Carrier Act, 52 Stat. 1238, the Commission could only authorize operation over routes and territories and it was beyond their jurisdiction to attempt to limit commodities to be transported. Failure to set aside and annul the order upon this ground was error.

4

The District Court erred as a matter of law in affirming the decision of the Commission wherein the Commission decided that it had authority to consider evidence of operations beyond the date of filing the application, to-wit: February 11, 1936, because under Section 206 (a) of the Motor Carrier Act, 52 Stat. 1238, the Commission is limited as a matter of law in considering continuity of operations prior to June 1, 1935 and since that time up to the date of filing the application, to-wit: February 11, 1936. It was error not [fol. 254] to set aside such order because it was based on evidence which the Commission was without jurisdiction to consider.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said decree of the District Court of the United States for the Northern District of Alabama, Southern Division, dated April 17, 1941 in the above entitled cause be reversed and a decree entered in favor of this appellant.

Boutwell & Pointer, 807 Massey Building, Birmingham, Alabama, Edgar Watkins and Allan Watkins, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia, Attorneys for Petitioner.

[fol. 255] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1941

[Title omitted]

PETITION FOR APPEAL—Filed May 2, 1941

To the District Court of the United States for the Northern District of Alabama, Southern Division, Composed of Circuit Judge McCord and District Judges Kennamer and Murphree:

Petitioner, Howard Hall Company, Inc., considers itself aggrieved by the final judgment of the District Court of the United States for the Northern District of Alabama, Southern Division in the above entitled cause where petitioner sought to set aside an order of the Interstate Commerce Commission denying certain parts of its application to the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 206 (a) of the Motor Carrier Act of 1935. 52 Stat. 1238.

This cause began by petitioner filing a complaint against the United States of America, which complaint attacked the validity of an order of the Interstate Commerce Commission, denying portions of its application under Section 206 (a) of the Motor Carrier Act of 1935. The petition attacked the validity of the order on several grounds, which are more fully set out in the assignments of error filed herewith pursuant to Rule 9 of the Rules of the Supreme Court of the United States. There is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Rules of [fol. 256] the Supreme Court of the United States.

Petitioner avers that in its application before the Interstate Commerce Commission, it sought operating rights as a motor carrier in interstate commerce over certain designated territory and the Commission, by its order, which petitioner sought to set aside, denied portion of the application, which order was affirmed by this court, composed of three judges. Petitioner avers that it has operated in accordance with its application for the past six years and that unless a supersedeas is granted to the decision and decree of the District Court dated April 17, 1941, petitioner will suffer irreparable injury by reason of having to cease and desist from operations it has conducted for the past

seven years and which the said right to conduct are involved in this appeal.

Wherefore, your petitioner prays for the allowance of an appeal from the District Court of the United States for the Northern District of Alabama, Southern Division, composed of Circuit Judge McCord and District Judges Kennamer and Murphree, to the Supreme Court of the United States, in order that the decision and final judgment of the District Court may be examined and reversed. Petitioner further prays that the proceedings and papers in this cause may be sent to the Supreme Court of the United States as provided by law and that a supersedeas be granted pending final determination of this appeal to the Supreme Court of the United States and that the cost bond tendered by the petitioner be approved.

This 2nd day of May, 1941.

Boutwell & Pointer, 807 Massey Building, Birmingham, Alabama, Edgar Watkins & Allan Watkins, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia, Attorneys for Petitioner.

[fol. 257] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 15, 1941

Appellant in the above entitled cause having prayed for an allowance of an appeal in this cause to the Supreme Court of the United States from the decree of the District Court made and entered in the above entitled cause on April 17, 1941 and having presented and filed its petition for appeal, accompanied by an assignment of errors, a statement as to jurisdiction and prayer for reversal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

It is Now Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the final decree of the District Court composed of Circuit Judge McCord and District Judges Kennamer and Murphree, dated April 17, 1941, and

It is Further Ordered that the Clerk of the District Court for the Northern District of Alabama, Southern Division, shall, within forty (40) days from this date make and transmit to the Supreme Court of the United States a true copy of the material parts of the record, which shall be designated by praecipe or stipulation of the petitioner and counsel herein.

It is Further Ordered that appellant shall give good and [fol. 258] sufficient bond in the sum of Five Hundred Dollars ($500.00) that said Appellant shall prosecute said appeal to effect and answer all costs if it fails to make good its plea.

It is Further Ordered that the judgment of the District Court of the United States for the Northern District of Alabama, Southern Division, dated April 17, 1941 be and the same is hereby superseded in this cause until final determination of said cause by the Supreme Court of the United States, the appellant having given good and sufficient supersedeas bond in the sum of Ten Thousand Dollars ($10,000.00).

Done by this Court this 2nd day of May, 1941.

Circuit Judge Leon McCord, District Judge C. B. Kennamer, District Judge T. A. Murphree.

[fols. 259-286] Citation in usual form showing service by affidavit on Attorney General of the United States omitted in printing.

[fol. 287] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD—Filed June 30, 1941

Appellant, Howard Hall Company, Inc., in accordance with paragraph 9 of Rule 13 of the Supreme Court, will rely on the following points:

1

That the District Court erred as a matter of law in affirming the decision of the Interstate Commerce Commission of

July 10, 1940, which denied part of appellant's application to the Commission and in refusing to set aside said order, because as a matter of law it was the duty of the Commission to consider evidence introduced by applicant of operations between June 1, 1935 and October 15, 1935, in accordance with provisions of Section 206(b) of the Motor Carrier Act, 49 Stat. 551, 52 Stat. 1238. The District Court erred in affirming the decision of the Commission in which the Commission refused to consider said evidence and failed to make a finding thereon.

[fol. 288]

2

That the District Court erred as a matter of law in affirming the decision of the Commission because the Commission in its decision specifically found that appellant had transported 55 movements of freight to and from points within 100 miles of Birmingham, Alabama, prior to June 1, 1935, but limited the authority granted appellant to Birmingham, Alabama, and a radius of 10 miles thereof. That as a matter of law, under Section 206(a) of the Motor Carrier Act, 52 Stat. 1238, the Commission was bound to grant, in accordance with the undisputed evidence of operations prior to June 1, 1935, to-wit: At least from Birmingham, Alabama, and 100-mile radius thereof. The failure to set aside said order, which limited the authority of the applicant to 10 miles of Birmingham, was error.

3

That the District Court erred as a matter of law in affirming the decision of the Commission wherein said Commission limited the operating rights of appellant under its application to the transportation of particular designated commodities over certain routes and within certain territories because as a matter of law the Commission had no authority to place any limitation on the operating rights of the appellant with respect to the commodities transported. Under Section 206(a) of the Motor Carrier Act, 52 Stat. 1238, the Commission could only authorize operations over routes and territories and it was beyond its jurisdiction to limit applicant to certain designated commodities. Failure to set aside and annull the order upon this ground was error.

The foregoing designated points will be relied upon by the appellant.

[fol. 289] Appellant designates the following parts of the record, which it designates necessary for the consideration of the foregoing points relied upon:

(1) Appellant's petition, including the exhibits attached thereto.

(2) The application of the appellant to the Interstate Commerce Commission on its Form BMC-A, filed February 11, 1936.

(3) The decision and opinion of Division 5 of the Interstate Commerce Commission of July 10, 1940.

(4) Order of the Interstate Commerce Commission issued February 3, 1941, which denied appellant's petition for further hearing.

(5) The opinion, findings of fact, conclusions of law and decree of the United States District Court for the Northern District of Alabama, Southern Division, composed of Circuit Judge McCord and District Judges Kennamer and Murphree.

(6) Assignments of error filed herein.

(7) Petition for appeal herein and order thereon.

(8) Citation on appeal, with service thereon.

(9) This statement.

Albert Boutwell, 807 Massey Building, Birmingham, Alabama; Edgar Watkins and Allan Watkins, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia.

June 28, 1941.

[fol. 290] GEORGIA,
Fulton County.

Personally appeared before the undersigned officer, duly authorized to administer oaths, Allan Watkins, who, after being duly sworn, deposes and says that he has on this the 28th day of June, 1941, mailed a copy of the foregoing statement of points and designation of record to the Attorney-General of the United States, to the attorney of record for

the Interstate Commerce Commission and also to the United States District Attorney for the Northern District of Alabama, Southern Division.

Allan Watkins.

Sworn to and subscribed before me this the 28th day of June, 1941. Lucille H. Printup, Notary Public, Georgia, State at Large. (Seal.)

[fol. 291] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

[Title omitted]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED—Filed July 5, 1941

Appellees designate for printing the following additional portions of the record:

1. Answer of the United States of America, filed April 14, 1941.

2. Answer of the Interstate Commerce Commission, filed April 14, 1941.

3. Appellees' Exhibit 1 introduced at the trial, being a copy of certain documents, duly certified by the Secretary of the Interstate Commerce Commission, relating to the proceeding known as Docket No. MC-42318, instituted by appellant before the Interstate Commerce Commission.

4. This designation.

Charles Fahy, Acting Solicitor General; S. R. Brittingham, Jr., Special Assistant to the Attorney General, Counsel for the United States. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Allen Crenshaw, Attorney, Interstate Commerce Commission, Counsel for the Interstate Commerce Commission.

[fol. 292] We certify that a copy of the foregoing Designation By Appellees of Additional Portions of Record to be Printed was this day mailed to:

Boutwell & Pointer, 807 Massey Building, Birmingham, Alabama.

Edgar Watkins and Allan Watkins, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia, Counsel for plaintiff-appellant.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Counsel for the United States.

July 3, 1941.

Endorsed on Cover: File No. 45,538. N. Alabama, D. C. U. S., Term No. 210. Howard Hall Company, Inc., Appellant, vs. The United States of America and Interstate Commerce Commission. Filed June 26, 1941. Term No. 210 O. T. 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 210

HOWARD HALL COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

STATEMENT AS TO JURISDICTION.

EDGAR WATKINS,
ALLAN WATKINS,
Counsel for Appellant.

BOUTWELL & POINTER,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 210

HOWARD HALL COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

STATEMENT AS TO JURISDICTION.

Plaintiff is a common carrier by motor vehicle of property in interstate commerce and as such filed an application for a certificate of convenience and necessity under Section 206 (a) of the Motor Carrier Act, United States Code Annotated, Title 49, Section 306 (a), 52 Stat. 1238. After a hearing was held before the Interstate Commerce Commission said Commission denied certain parts of the application.

Section 205 (h) of the Motor Carrier Act, U. S. Code Annotated, Title 49, Section 305 (h), 52 Stat. 1237 and 1238, provide that any final order of the Interstate Commerce Commission shall be subject to review by the court in the same manner as orders of the Commission are subject to review under Part I of the Transportation Act relative to rail carriers.

Plaintiff filed this suit under authority of Title 28, Sections 46 and 47 of the U. S. Code Annotated, 36 Stat. 1149, 38 Stat. 32, seeking to set aside and annul a final order of the Interstate Commerce Commission.

Direct appeal from a final decree by a 3-judge court to the Supreme Court of the United States is authorized by U. S. C. A., Title 28, Section 345 (4), 43 Stat. 938.

United States v. *Maher*, 307 U. S. 148, 83 L. Ed. 1162, involved a similar appeal.

Copy of the opinion of the 3-Judge District Court which heard this case is attached hereto.

Appellant has served upon appellees within five (5) days from the allowance of the petition for appeal a copy of the same and in addition the order allowing the appeal, together with a copy of the assignments of error and of this statement and this statement hereby specifically directs the attention of the appellees to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

WHEREFORE, it is respectfully submitted that jurisdiction of this Court lies and that this appeal is the proper way of invoking the jurisdiction of this Court.

This 2nd day of May, 1941.

BOUTWELL & POINTER,
807 Massey Building,
Birmingham, Alabama;
EDGAR WATKINS AND
ALLAN WATKINS,
1403 Citizens & Southern
National Bank Building,
Atlanta, Georgia,
Attorneys for Petitioner.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

Civil Action No. 5215.

HOWARD HALL COMPANY, INC., *Plaintiff*,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Before McCord, Circuit Judge, and Kennamer and Murphree, District Judges.

McCORD, *Circuit Judge:*

The petitioner, Howard Hall Company, Inc., is an Alabama corporation operating as a motor carrier with offices and principal place of business in Birmingham, Alabama. On February 11, 1936, it filed application with the Interstate Commerce Commission for a certificate of public convenience and necessity under the "grandfather clause" of Section 206(a) of the Motor Carrier Act of 1935, 49 U. S. C. A. § 306(a).

The carrier sought a certificate authorizing "continuance of operation in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson."

The application was filed and docketed by the Interstate Commerce Commission and a hearing was held before a trial examiner on February 15, 1937. Rail and motor car-

riers appeared in opposition to the application. At this first hearing the application was amended by eliminating therefrom all points in Wisconsin, Texas, Arkansas, Kansas, Missouri, and points in Florida south of Tampa and Lakeland, and points north of Chicago. The Examiner issued a recommended report and order on May 13, 1937, but, on motion of Howard Hall Company, Inc., the report was withdrawn and a further hearing set for August 20, 1937. After the second hearing and on November 30, 1937, the Examiner issued his report and order recommending that certain rights be granted to the applicant. Exceptions to the report were filed by the carrier, and on July 10, 1940, Division 5 of the Interstate Commerce Commission handed down its report and decision in the case. It found that the applicant had not served "enough representative points in all the states claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application." After reviewing the evidence before it the Commission further found that the applicant "on June 1, 1935, and continuously since that time, has been, in *bona fide* operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, * * *, between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on the north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 92 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Chattanooga and Birmingham; all over irregular routes; that by reason of such operation it is entitled to a certificate authorizing the continuance thereof; and that the application in all other respects should be denied." Howard Hall Co., Inc., Common Carrier Application, 24 M. C. C. 273.

The order entered pursuant to the decision was to become effective on August 31, 1940, the carrier filed application for rehearing and redetermination, and the Commission from time to time postponed the effective date of the order until February 3, 1941, when a final order of denial was entered. Thereafter, on February 28, 1941, under the provisions of 28 U. S. C. A. §§ 41 (28) 43-48, Howard Hall Company, Inc., filed petition in this court to enjoin, set aside, and render ineffective that portion of the Commission's order which denied part of its application for a "grandfather" certificate. The Interstate Commerce Commission intervened as a party defendant under the provision of 28 U. S. C. A. § 43(a). A court of three judges was convened as required by statute, 28 U. S. C. A. § 47, and a hearing was held in Birmingham on April 14, 1941.

By stipulation and agreement of the parties and their respective counsel all issues presented by the petition are to be disposed of in this one proceeding and the case is, therefore, to be now decided upon its merits:

In a court review of an order of the Interstate Commerce Commission the range of issues is narrow. We are confined to a determination of whether or not the Commission's order violates the Constitution, exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. Of such cases the Supreme Court recently said, "Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." Rochester Telephone Corp. *v.* United States, 307 U. S. 125; United States *v.* Maher, 307 U. S. 148; I. C. C. *v.* Ill. Cent. R. Co., 215 U. S. 452; Commerce 11 Am. Jur. §§ 172-174, et seq.; Commerce, 15 C. J. S, § 148, p. 554, et seq.

Under the "grandfather clause" of the Motor Carrier Act the applicant, to be entitled to a certificate of public convenience and necessity, must have been engaged in "*bona fide*" operation as a motor carrier on June 1, 1935, "over the route or routes or within the territory for which application is made and has so operated since that time."

In the determination of this fact question the weight of the evidence is for the Commission and not for the court. Loving, et al. *v.* United States, 32 F. Supp. 464, affirmed 310 U. S. 609; Eastern Carrier Corp. *v.* United States, 31 F. Supp. 232, affirmed — U. S. —, 60 S. Ct. 898; Philadelphia-Detroit Lines *v.* United States, 31 F. Supp. 188.

The petitioner recognizes the above stated principles but contends that the Commission erred as a matter of law in four particulars.

It is first contended that although the Commission received evidence of operations for the "interim" period from June 1, 1935, to October 15, 1935, that it gave no consideration to such evidence, and that it erred in refusing to make a finding and grant a certificate under the provision of the "interim" section, Section 206(b), 49 U. S. C. A. § 306(b). The Commission received evidence of the "interim" operations of the petitioner and it will not be presumed that it failed to give due consideration to such evidence in passing upon the application for "grandfather" rights. Moreover, it appears that on October 30, 1939, Howard Hall Company, Inc., filed a separate application with the Commission for authority to operate under the provisions of Section 206(b), and that after a hearing the Commission issued a certificate of public convenience and necessity authorizing the carrier to carry on certain operations. No. Mc-42318 (Sub-No. 1) Interstate Commerce Commission. There is no merit in the contention that other rights under Section 206(b) should be granted under this petitioner's "grandfather" application. The petitioner's present contention is but an attempt to retry issues already heard and determined by the Commission in another proceeding.

The petitioner's second contention is that there was evidence and a finding that there had been 55 movements of freight to and from an area within 100 miles of Birmingham prior to June 1, 1935, and 270 movements in the area thereafter, and that the Commission, therefore, erred as a matter of law in limiting operations "between Birmingham, Alabama, and all points within 10 miles thereof", and that the area should have been "within 100 miles of Birmingham". As to movements of freight in the 100 mile area the

Commission found that of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, and that only 55 moved from points within 100 miles of Birmingham, and that only "12 points were served in this comparatively large territory surrounding applicant's headquarters in Birmingham." Of 2,550 shipments transported after June 1, 1935, only 270 moved to or from 100 miles of Birmingham. The evidence of shipments within the 100 mile area claimed by the petitioner did not show substantial, *bona fide* operations of sufficient regularity to require the issuance of a certificate under the "grandfather clause" authorizing free lance operation in this large territory. In limiting the applicant's operations to and from Birmingham to a ten mile zone beyond the city limits of Birmingham the Commission acted within its authority and not capriciously or arbitrarily.

The petitioner further contends that the Commission had no right to consider evidence of continuous operations beyond the date of the filing of the "grandfather" application. There is no merit in this contention. Those who seek "grandfather" rights under Section 206(a) must establish not only that they were in *bona fide* operation on June 1, 1935, but also that such operations were carried on continuously "since that time". In other cases, as here, the Commission has consistently refused to determine the rights of an applicant as of the date of the filing of the application, and has held that the requirement of continuity of operations is not dispensed with when the application for a "grandfather" application is filed. The words of the statute, "since that time", may not be limited and construed to mean "since that time and until the filing of an application". Evidence of activities of the petitioner subsequent to the filing of the application was properly received and considered by the Commission. United States *v.* Maher, 307 U. S. 148, 155; Gregg Cartage & Storage Co. *v.* United States, et al., D. C., N. D. of Ohio, recently decided, — F. Supp. —; Atlantic Motor Exp., Inc., Common Carrier Application, 12 M. C. C. 576, 579-580.

The petitioner's final contention is that the Commission was without authority to limit certain of its operations to the transportation of specified commodities between desig-

nated points. Upon the evidence before it the Commission found that:

1. "* * * prior to and since June 1, 1935, applicant has held itself out to transport general commodities, with certain exceptions, between Birmingham and vicinity, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those points in Florida north of and including Tampa and Lakeland, and has actually conducted an operation consistent with such holding out."

2. "In addition the record shows that, prior to and since June 1, 1935, the applicant transported paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; cloth from Alabama City, Ala., to Wheeling, W. Va.; and matches from Wheeling to Chattanooga and Birmingham."

Consistent with the first finding above quoted the Commission granted general authority to transport commodities in the territories there named. In accordance with the second finding the Commission limited the Applicant's authority to the territory and points named and the commodities listed. Applicant was thereby granted authority, both general and limited, to carry on virtually every substantial operation in which it had been engaged when the "grandfather clause" became effective. Under the facts and circumstances of the case this limitation upon the carrier's authority was just and equitable, and in so holding the Commission acted clearly within its province. Loving, et al. *v.* United States, 32 F. Supp. 464, affirmed 310 U. S. 609; Eastern Carrier Corp. *v.* United States, 31 F. Supp. 232, affirmed 60 S. Ct. 898; Cf. Carolina Freight Carriers Corp. *v.* United States, D. C. of W. D. of N. C., decided April 5, 1941, — F. Supp. —.

On the record before us, which includes a transcript of the evidence before the Commission and a copy of the exhibits, we are of opinion and so hold that the evidence justified the order which was entered. The findings and holdings of

the Commission are supported by the evidence, are not arbitrary or capricious, and will not be disturbed.

This court finds no reason to set aside, annul, or suspend the order of the Commission. The complaint is without merit and is hereby

Dismissed.

Done this 17th day of April, 1941.

LEON MCCORD,
United States Circuit Judge.
C. B. KENNAMER,
United States District Judge.
T. A. MURPHREE,
United States District Judge.

(5042)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

NO. 210

HOWARD HALL COMPANY, INC.
Appellant

VERSUS

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees

BRIEF OF APPELLANT

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SUBJECT INDEX

INDEX OF CASES

IN THE

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NO. 210

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UNITED STATES OF AMERICA AND
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Appellees

BRIEF OF APPELLANT

I. THE OPINION OF THE COURT BELOW

The opinion in this case by the United States District Court for the Northern District of Alabama, composed of Circuit Judge McCord and District Judges Kennamer and Murphree rendered April 17, 1941, is reported under the style of *Howard Hall Company, Inc. v. United States of America et al,* 38 Fed. Supp. 556.

II. JURISDICTION

The jurisdiction of this court has been discussed in the statement as to jurisdiction filed in compliance with Rule 12. Plaintiff filed this suit under authority of Title 28,

Sections 46 and 47 of the United States Code Annotated, 36 Stat. 1149, 38 Stat. 32, seeking to set aside and annul the final order of the Interstate Commerce Commission under the Motor Carrier Act, Title 49, Sections 301 ff., 49 Stat. 543. Direct appeal from a final decree by a Three Judge Court to the Supreme Court of the United States is authorized by U. S. Code Annotated, Title 28, Section 345 (4), 43 Stat. 938. *United States v. Maher*, 307 U. S. 148, 83 L.ed. 1162, involved a similar appeal.

III. STATEMENT OF THE CASE

The appellant is a common carrier by motor vehicle of property in interstate commerce and as such filed an application for a certificate of convenience and necessity under Section 206 (a) of the Motor Carrier Act, generally referred to as the "grandfather" clause, U. S. Code Annotated, Title 49, Section 306 (a), 52 Stat. 1128. (See plaintiff's Exhibit 1, Record page 16.) In the application appellant claimed to have operated as a common carrier of commodities generally over irregular routes between points in Alabama and points in a number of other states prior to June 1, 1935 and continuously since that time. Two hearings were held by the Interstate Commerce Commission and evidence was introduced in support of the application (R. 9). The transcript of the evidence introduced before the Interstate Commerce Commission is not set out in the record before this court. The findings of the Interstate Commerce Commission as set out in its opinion are sufficient to raise the issues involved in this case. The Interstate Commerce Commission found that the appellant was a common carrier by motor vehicle and had been prior to June 1, 1935. The Commission further found that appellant was entitled to a certificate

as such and certain operating authority was granted but other parts of the application was denied. Motion for rehearing was filed and was denied by the Commission (R. 15).

The Interstate Commerce Commission in its decision found that the appellant prior to the grandfather date had transported 55 shipments to and from points located within a radius of 100 miles of Birmingham to points and places in other states, but limited the authority granted to a radius of ten miles of Birmingham and points in the other states (R. 10, 13). The appellant contends that such limitation was unjustified, arbitrary and capricious.

The Interstate Commerce Commission in its decision authorized the appellant to transport commodities generally to a limited territory and further granted authority to transport certain designated commodities between certain designated points in addition to the authority to transport commodities generally. This was based on evidence of actual operations between the said points (R. 13). Appellant contends that a common carrier can not be so limited as to the commodities it can transport.

Upon the order of the Interstate Commerce Commission denying appellant's motion for rehearing becoming final, appellant filed its complaint with the District Court for the Northern District of Alabama, Southern Division, seeking to restrain the enforcement of the order of the Interstate Commerce Commission insofar as it amounted to a denial of the application of the appellant and prayed that a Three Judge Court be assembled to hear the case. Evidence was introduced and the Court in its opinion substantially recited the facts as set out by the Interstate

Commerce Commission and affirmed the decision of the Interstate Commerce Commission. This appeal is from that decision.

IV. SPECIFICATIONS OF ERROR

(1) The District Court erred as a matter of law in affirming the decision of the Interstate Commerce Commission, which decision limited applicant's operating authority to; between Birmingham and points and places within ten miles thereof to points in other states, because the Commission in its decision specifically found that appellant had transported 55 shipments of freight to and from points within 100 miles of Birmingham, Alabama and points in other states prior to June 1, 1935; that as a matter of law under Section 206 (a) of the Motor Carrier Act, Title 49, Section 306, United States Code Annotated, 52 Stat. 1238, the Commission was bound to grant authority in accordance with the undisputed evidence of operations prior to June 1, 1935, to-wit: Between Birmingham, Alabama, and 100 mile radius thereof to points in the other states. Failure to set aside the order of the Commission which limited the operating authority of the appellant to a radius of ten miles of Birmingham was error.

(2) That the District Court erred as a matter of law in affirming the decision of the Interstate Commerce Commission wherein said Commission limited the operating rights of appellant under its application to the transportation of certain designated commodities to certain designated points for the reason that as a matter of law the Interstate Commerce Commission has no authority to place any limitations upon the operating rights of the

appellant with respect to the commodities transported because the Commission found that the appellant was a common carrier by motor vehicle. Under Section 206 (a) of the Motor Carrier Act, Title 49, Section 306, United States Code Annotated, 52 Stat. 1238, the Interstate Commerce Commission could only authorize operations over routes and territories and it is beyond its jurisdiction to limit applicant to certain designated commodities, as applicant was found to be a common carrier by motor vehicle. Failure to set aside and annul the order upon this ground was error.

V. SUMMARY OF ARGUMENT

POINT A. Under Section 206 (a) of the Motor Carrier Act, the Interstate Commerce Commission must grant a carrier a certificate of convenience and necessity upon its proof of bona fide operations prior to June 1, 1935, and the Interstate Commerce Commission is without jurisdiction arbitrarily to determine that a certain number of shipments are not sufficient to grant authority in that territory.

POINT B. Under Section 206 (a) of the Motor Carrier Act, the Interstate Commerce Commission is without jurisdiction to limit a common carrier by motor vehicle to designated commodities and must grant a certificate of convenience and necessity on proof of operations prior to June 1, 1935 over the routes and territories, regardless of the number of different general commodities transported.

VI. ARGUMENT AND AUTHORITIES

Point A

The Decision of the Commission Was Contrary to the Evidence

Section 206 (a) of the Motor Carrier Act provides that if any motor carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 over the route or routes or within the territory for which application is made and has so operated since that time, *** the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operations, ***." The Interstate Commerce Commsision found as a fact that the appellant had transported at least 55 shipments to and from points located within 100 mile radius of Birmingham and outside of the 10 mile radius to points in other states prior to June 1, 1935. It further found that out of the whole 1,000 shipments transported during this period the large majority of them moved to and from Birmingham. It was then stated that the 55 shipments were too few to be considered in granting the authority sought (R. 10, 11). Section 206 (a) of the Motor Carrier Act does not place any requirements as to the number of shipments that must be transported before a certificate of convenience and necessity under the grandfather clause can be granted. The language of the Act is clear and unarabiguous. The Commission in it's opinion has exceeded the power granted to it by Congress by ignoring the operations conducted by the appellant prior to June 1, 1935. It is natural that a carrier would have more shipments to or from its headquarters than within a radius of 100 miles thereof, but the fact remains that the appellant did handle 55

shipments within that 100 mile radius. Appellant must have held himself out to operate as a common carrier throughout this territory. The Act provides with respect to operating authority "over the route or routes or *within the territory.*" Why should the Commission take the arbitrary figure of ten miles, in view of the finding that appellant had operated within the 100-mile radius?

There is a difference in the type of operation conducted by a regular route carrier and that by an irregular route carrier. The former, operating over fixed, designated routes and schedules, the latter over no fixed routes and on call and demand. Congress recognized this distinction in drafting the "grandfather" clause. This is indicated by the use of the phrase "over the route or routes or *within the territory.*" The appellant, an irregular route carrier furnishing service on call, had operated within the territory of 100 miles of Birmingham 55 times prior to June 1, 1935. The purpose of the "grandfather" clause in the Motor Carrier Act was to allow all motor carriers to continue to operate and do what they had been doing prior to June 1, 1935. To limit appellant to a ten-mile radius deprives him of that part of his business enjoyed on the "grandfather" date. It deprives him of a right granted to him by Congress and the Commission in its decision in this case has gone contrary to the intention of Congress and the clear provisions of the Motor Carrier Act. A property right has been taken without due process of law.

The Commission must consider all of the evidence before it and can not arbitrarily make a finding contrary to undisputed evidence. *Texas Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S. 197. It is true that it has been held numerous times that the courts

will not disturb a finding of fact by the Commission, but it has also been held "the basic prerequisites of proof can be raised" in a court of law. *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 140. The Commission has found the facts but has ignored the effect of their findings. They have failed to give effect to that provision of the "grandfather" clause "within the territory."

The Commission, in granting part of the application, gave the applicant the right to transport commodities between Birmingham and 10 miles and all points in the states of Georgia, North Carolina, South Carolina, Mississippi and part of Florida (R. 13). If on destination points it can give the applicant the right to go into such a wide territory when there was no showing of a movement to every point within the states of Georgia, Florida, Mississippi, etc., by what authority can they limit the applicant to Birmingham and a ten-mile radius thereof? If the Commission holds that by operations to several points in a territory it will include the whole territory, by the same reasoning it must grant authority to operate from Birmingham and a 100-mile radius thereof.

Point B

The Interstate Commerce Commission Is Without Jurisdiction to Limit A Common Carrier by Motor Vehicle to Certain Designated Commodities

The Commission found that the appellant was a *common carrier* by motor vehicle of general commodities between Birmingham and a radius of ten miles thereof and points in North Carolina, Georgia, Mississippi, South Carolina and part of Florida prior to June 1, 1935. The Commission further found that appellant was a

common carrier of paper from Birmingham to New Orleans, Louisiana, Chattanooga and Knoxville, Tennessee, and from Kingsport, Tennessee to Birmingham, Alabama; iron and steel articles from Canton, Ohio, to Birmingham; cloth from Alabama City, Alabama to Wheeling, West Virginia, matches from Wheeling, West Virginia to Chattanooga and Birmingham (R. 13). A certificate was granted accordingly.

The grant of a certificate in this form is contrary to the universal conception of a common carrier that has been held for generations. It is inconsistent to say that a carrier has held itself out to transport general commodities to a certain territory but has restricted its holding out to certain specific points and commodities in adjacent territory. Obviously, the scope of appellant's operation was limited by the shippers and not by the refusal of the appellant to transport all commodities offered to him. The Commission recognized that the Howard Hall Co. had transported other commodities to other territories but denied authority to operate on the ground that it had not transported these shipments with any degree of regularity (R. 13). The appellant is an irregular route carrier, furnishing transportation on demand, and it is natural that the shipments to the various points in the territory which the Commission denied would be less than in the territory nearer the carrier's headquarters. No carrier would hold itself out to haul iron and steel articles from Ohio to Alabama without seeking return hauls from Alabama to Ohio. The inconsistency in so limiting the applicant's certificate is pointed out by Judge Parker in the *Carolina Freight Carriers Corporation v. United States*, 38 Fed. Supp. 549, where it is said at page 553:

"There is nothing in this language or in the reason and spirit of the act which justifies the limiting of certificates granted common carriers under the grandfather clause to the precise commodities which they have theretofore hauled or in the case of carriers by irregular routes to the precise points that they have served in the territory over which they have operated. It is well settled that 'a common carrier is one who undertakes for hire or reward, to transport the goods of such as choose to employ him from place to place.' Dwight v. Brewster, 1 Pick., Mass., 50, 53, 11 Am. Dec. 133; Dobie on Bailments and Carriers, § 107; Hutchinson on Carriers, 3d ed., sec. 47."

The language used in Section 206 (a) of the Motor Carrier Act contains no reference to commodities and the limitation of common carriers to certain commodities is not authorized by this section. Operations over designated routes and "within the territory" is the language used. If common carriers are to be restricted to certain commodities then a new application for a certificate would be necessary if new commodities came into existence. Sections 207 and 208 of the Motor Carrier Act, dealing with certificates and their terms, do not mention commodities but deal with "operations," "service," "routes," "territory." If it had been the intention of Congress to grant the Interstate Commerce Commission the power of limiting common carriers to certain commodities, the provisions with respect thereto would have been written in Sections 206, 207 and 208 of the Motor Carrier Act.

Part 1 of the Transportation Act regulating railroads contains no limitation as to the commodities the railroads

may transport and the Interstate Commerce Commission has never attempted to exercise any such jurisdiction over railroads. (Compare Title 49, U. S. Code Annotated, Section 1, paragraph 18, with Section 206 (a) of the Motor Carrier Act.) The terminology is similar and no limitation with respect to commodities is contained in either. To allow common carriers by railroad unrestricted rights and to deny common carriers by motor vehicle over irregular routes the right to transport commodities generally is an unjust discrimination. It is a hardship on the public to say "there exists a peculiar type of common carrier by motor vehicle which can haul some shipments, but only a limited type of shipment, and it is the duty of public to find out which shipments the Interstate Commerce Commission has authorized the motor carrier to haul."

The Interstate Commerce Commission stated one of the reasons for denial of part of the application in this case as follows:

> "Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service." (R. 12)

This can not be a reason, unless the Motor Carrier Act so directs the Commission. There is no direction in Section 206 (a) which would authorize the Interstate Commerce Commission to discriminate against the irregular route carriers in favor of the regular route carriers. The

answer to this argument advanced by the Commission is well stated in the *Carolina Freight Carriers Corporation v. United States*, supra, where it is said at page 556:

> "But Congress has made no such distinction between common carriers by regular and those by irregular routes; and, for the Commission to make such distinction is to add to the act of Congress in favor of one class of carriers and against another. This the Commission cannot do. Ann Arbor R. Co. v. United States, 281 U. S. 658, 50 S. Ct. 444, 74 L. ed. 1098; Anchor Coal Co. v. United States, D. C., 25 F. 2nd 462."

Counsel for the appellee relied strongly on the case of *Loving v. United States*, 310 U. S. 609, 84 L.ed. 1387, affirming per curiam 32 Fed. Supp. 464. One essential difference between that case and the case at bar is that the Commission did not grant the applicant any rights as a common carrier of commodities generally but restricted the applicant to a few limited commodities to and from limited points. In the present case the Commission has tried to make the applicant into two types of a common carrier. One type is a common carrier of commodities generally in one locality and a very different type of a common carrier of limited commodities in another locality. Loving's operations seem to have been those of a contract carrier rather than a common carrier. He sought to serve a wide territory whereas the evidence showed he had only one truck on June 1, 1935 and transported few commodities. The appellant had eleven trucks and hauled many commodities (R. 9). The appellant held himself out as a common carrier throughout all territories and made no attempt to limit his operation.

McDonald v. Thompson, 305 U. S. 263, 83 L.ed. 164, relied on by opposing counsel in the District Court, has no bearing here. It was a suit by the Texas Railroad Commission to enjoin an illegal operation over the highways of Texas.

United States v. Maher, 307 U. S. 148, 83 L.ed. 1162, also relied on by counsel for the appellee, was a case where an irregular route motor carrier changed his operations to that of a regular route subsequent to the grandfather date and therefore is not in point on the issues presented here.

It was further urged by counsel for the appellees that the definition of a common carrier as contained in Section 203 (a), paragraph (14) [1] of the Motor Carrier Act, authorized the Interstate Commerce Commission to limit common carriers to certain commodities. The phraseology "any class or classes of property" is used and it is urged that this should be construed to mean any commodities and it is argued that if so construed the Interstate Commerce Commission under Section 206 (a) could then limit common carriers to any commodity. That is, they could limit a carrier to a certificate as a common carrier of cloth or of nails, etc. Had this been the intended meaning of the Motor Carrier Act, Con-

(1) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property of any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (As amended by Public Act No. 785, 76th Congress, Sec. 18(a), approved September 18, 1940 (Transportation Act of 1940).)

gress would have used different and definite language respecting the limitation, because this type of carrier would have been unique in the existing motor carrier field. At the time the Motor Carrier Act was passed, there were several different classes of carriers, such as petroleum carriers, carriers of household goods, carriers of motor cars, carriers of explosives, etc. By Section 204 (c) of the Motor Carrier Act, the Commission is authorized to classify carriers and this has been done by the Commission, 2 M.C.C. 703. Carriers have been classified in 17 groups, the first being designated "carriers of general freight." These groups are the "classes of carriers" that are referred to in Section 203 (a), paragraph (14), and not carriers of specified commodities of a general nature. The Interstate Commerce Commission found that the appellant was a common carrier of commodities generally and by this finding they will be bound to place this carrier in the classification "carriers of general freight" and therefore it can not be urged that the Commission has any authority to limit this carrier to any particular commodity.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Interstate Commerce Commission erred in failing to grant the appellant authority to serve points within 100-mile radius of Birmingham, Alabama and points in other states in which it operates. The Interstate Commerce Commission exceeded their jurisdiction in limiting the authority of the appellant to certain designated commodities between certain points. It is further submitted that the order of the Interstate Commerce Commission should

be set aside and the cause remanded to the end that the Commission may pass upon the application of the plaintiff in accordance with the provisions of the Motor Carrier Act.

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No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1941

HOWARD HALL COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

JANUARY 1942.

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OPINION BELOW

The opinion of the specially constituted District Court (R. 43) is reported in 38 F. Supp. 556. The report of the Interstate Commerce Commission (R. 8), hereinafter called the Commission, is reported in 24 M. C. C. 273.

JURISDICTION

The final decree of the District Court (R. 53) was entered April 17, 1941, and the appeal was

allowed May 15, 1941 (R. 57). Probable jurisdiction was noted October 13, 1941. The Court's jurisdiction rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; 28 U. S. C. [Supp. III], secs. 45 and 47a), and section 238 of the Judicial Code as amended by the Act of February 12, 1925 (c. 229, 43 Stat.)

QUESTIONS PRESENTED

The appellant, by application filed with the Commission under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (Part II, Interstate Commerce Act), sought a certificate of public convenience and necessity authorizing continuance of operation as a common carrier of general commodities (all commodities suitable for transportation in an ordinary truck, with certain exceptions) over irregular routes between any and all points within practically all the States east of the Mississippi River except the New England States (R. 9). The Commission, after hearing, granted a certificate authorizing the continuance by appellant (1) of operations as a common carrier of general commodities over irregular routes between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, South Carolina, Georgia, Mississippi, and the northern portion of Florida, and (2) of opera-

tions as a common carrier of certain specified commodities over irregular routes between certain designated points. In all other respects the application was denied by the Commission's order. The District Court sustained the order as valid and, in this Court, the appellant has abandoned certain contentions advanced below. The questions presented here are:

(1) Whether the Commission, in granting appellant authority to operate between Birmingham and its industrial area,[1] on the one hand, and points in other States, on the other hand, either erred as matter of law, or acted arbitrarily, in failing to extend such authority to cover a "belt" of territory of 100-mile radius encircling the city.

(2) Whether, in those instances where the Commission found that appellant carried, during the "grandfather" period, only one commodity, or a few particular commodities, with such degree of regularity as to constitute substantial service, it was, nevertheless, required by the statute to grant operating authority covering "general commodities."

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[1] The Commission, in prescribing the 10-mile zone, said (R. 12):

"The extent of this industrial area is not clear from the record, but we believe that a radius of 10 miles of Birmingham will include all that is important."

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is a direct appeal from a final decree (R. 53) of the court below dismissing a petition filed by the appellant motor carrier to enjoin and set aside an order entered by the Commission in a proceeding entitled *Howard Hall, Inc., Common Carrier Application,* No. MC-42318, 24 M. C. C. 273.

The Commission proceeding was instituted by application filed by the carrier February 11, 1936, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (Part II of the Interstate Commerce Act) asking authority to continue operation as a common carrier by motor vehicle of general commodities between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, and the District of Columbia, all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson, Tex.[2]

[2] Subsequently the appellant withdrew its application with respect to all points in Wisconsin, Texas, Arkansas, Kansas,

Section 206 (a) provides that "no common carrier by motor vehicle shall engage in any interstate or foreign operation on any public highway * * * unless there is in force, with respect to such carrier, a certificate of public convenience and necessity, issued by the Commission, authorizing such operations." This is subject to the proviso (the "grandfather" clause) to the effect that if any such carrier was in bona fide operation on June 1, 1935, "over the route or routes or within the territory for which application is made," and has so operated since that time, except as to interruptions over which it has no control, the Commission shall issue such certificate without requiring further proof of public convenience and necessity. Pending determination of the application the applicant is authorized to continue operations. Section 208 (a) provides that the certificate issued under section 206 (a) shall specify the service to be rendered, and "in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate."

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and Missouri, points in Florida south of Tampa and Lakeland, and points north of Chicago. After this change the application prayed a "general commodity" certificate covering operations between all points in Alabama, Georgia, North Carolina, South Carolina, Kentucky, Tennessee, Indiana, Ohio, Mississippi, Louisiana, Virginia, West Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, District of Columbia, Florida north of Tampa and Lakeland, Illinois south of Chicago, and those parts of Michigan within 200 miles of Detroit and Benton Harbor.

A number of competing railroads and motor carriers intervened in the Commission proceeding in opposition to the application. Two hearings were held in Birmingham, Ala., the one in February 1937 and the other August 20, 1937, on application by appellant for reopening to introduce additional evidence.[3] A recommended report was prepared by a Commission examiner, to which exceptions and briefs were filed by various parties to the proceeding, including appellant. On July 10, 1940, the Commission made its report and order (R. 8, 14), by which it authorized the continuance by appellant (1) of operations as a common carrier of general commodities (with specified exceptions)[4] over irregular routes between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, South Carolina, Mississippi, and those in Florida north of a designated line, and (2) of operations as a common carrier over irregular routes of—

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[3] The record in this Court omits the evidence before the Commission, a transcript of which appellant introduced in evidence in the District Court. The appellant in its brief (p. 2) says: "The findings of the Interstate Commerce Commission as set out in its opinion are sufficient to raise the issues involved in this case."

[4] The exceptions specified were "commodities of unusual value, high explosives, commodities in bulk, commodities requiring special equipment, and household goods, uncrated or in lift vans in connection with so-called household movings" (R. 13).

"* * * paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham, of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham, of cloth from Alabama City, Ala., to Wheeling, W. Va., and of matches from Wheeling to Chattanooga and Birmingham" (R. 13).

The application was in other respects denied.

The Commission, in support of that part of its order which authorized appellant's operations as a general commodity carrier just above described, pointed out that a large proportion of the shipments shown to have been carried by appellant prior to the "grandfather" date, had moved between Birmingham and its industrial area and the four States and part of Florida covered by the authority so granted, and that the shipments had been made to numerous points of destination and had included a wide variety of commodities (R. 10). With respect to those operations the Commission found that appellant had not only held itself out to carry general commodities between Birmingham and vicinity and all points in the particular States but "had actually conducted an operation consistent with such holding out" (R. 11). In answer, however, to the contention of appellant that it was entitled to authority to operate "between Birmingham and points within

100 miles thereof, on the one hand * * *" (R. 12), the Commission pointed out in its report that the appellant had carried prior to the "grandfather" date only 55 shipments to, or from, the 100-mile area referred to, and that it had served only 12 points in that extensive area.[5] Thereafter the Commission stated that undoubtedly—

> "applicant did serve various industries located in the immediate vicinity of Birmingham. The extent of the industrial area is not clear from the record but we believe that a radius of 10 miles of Birmingham will include all that is important" (R. 12).

As for that part of the order which authorized appellant's operations as a carrier of particular commodities, the Commission pointed to the fact that in addition to the evidence of shipments of a wide variety of commodities between Birmingham and points in the five southern States, the record showed shipments prior to the "grandfather"

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[5] The Commission detailed its findings concerning appellee's operations in the region of Birmingham by stating:

"Of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, 55 moved to or from points within 100 miles of Birmingham, 50 moved between points in States other than Alabama, and 15 moved from Fowl River, Ala. * * *

"Of 2,550 shipments handled after June 1, 1935, 2,030 moved to or from Birmingham, 270 moved to or from points within 100 miles of Birmingham, and 250 moved between points in States other than Alabama" (R. 10).

date of the particular commodities covered by the authorization between Birmingham and specific points in other States and between certain other specific points (R. 11). Certain other commodities referred to in the report as having been carried by appellant between Birmingham and other specific points and between specific points, not including Birmingham, were not shown to have moved in such quantity and with such degree of regularity as to constitute substantial service.

As will have been seen, appellant's application covered a large part of the United States. It was amended at the first hearing to exclude certain States west of the Mississippi River (R. 9) and the report deals with the amended application. Referring to it generally, the Commission said:

> "* * * Although applicant claims 'grandfather' rights to conduct operations between all points in a vast territory comprising practically all of the United States east of the Mississippi River except the New England States, the record shows that prior to June 1, 1935, its traffic moved preponderately between Birmingham and vicinity, on the one hand, and various other points in eastern United States on the other. * * *" (R. 9).

The Commission later mentioned that appellant's headquarters were located at Birmingham and that it owned, as of June 1, 1935, "11 trucks

which number had increased to 17 at the time of the first hearing in February 1937" (R. 9, 12). In disposing of the application in respects not dealt with by the authorization granted, the Commission said:

> "It is clear that shipments other than those described above, moving prior to June 1, 1935, between points in States other than Alabama, and between Birmingham and vicinity, on the one hand, and other States, on the other, were not made with any degree of regularity and do not represent a substantial showing of service sufficient to establish bona fide operations since prior to June 1, 1935, from, to, and between all points in the broad territory claimed. No shipments whatever are shown to have been handled by applicant prior to June 1, 1935, to or from points in Delaware, Maryland, Michigan, New Jersey, and the District of Columbia" (R. 13).

Appellant, on February 28, 1941, filed a petition asking that the Commission's order be enjoined and set aside insofar as it denied appellant's application (R. 1). The defendants, the United States and the Commission, filed answers denying all material allegations of the petition (R. 18, 20). On April 14, 1941, the hearing before the specially constituted three-judge court was held, at which hearing a certified copy of the record made before the Commission was introduced in evidence, and the case was orally argued and submitted for

decision. On April 17, 1941, the Court filed its opinion sustaining the Commission's order as in all respects valid (R. 43). On the same date the Court filed its findings of fact and conclusions of law (R. 49) and entered its final decree dismissing the petition (R. 53).

While appellant's petition advanced several grounds in support of the relief asked for, it relies upon two only in this Court, which are shown in the "Specifications of Error" in appellant's Brief, and in the "Questions Presented" in this brief, page 2, *supra.*

SUMMARY OF ARGUMENT

Since the appellant has not produced the record of evidence taken in the Commission proceeding, this appeal is subject to "the settled rule that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made." *Mississippi Valley Barge Line* v. *United States,* 292 U. S. 282, 286, and cases cited. Apparently appellant's "Specifications of Error" are intended to raise questions only as to the Commission's statutory authority and arbitrary action. The latter, so appellant asserts, is shown by the findings, but it is rarely the case that a charge of arbitrary action may be properly made without producing the record.

The appellant does not challenge the Commission's order in the respect that it denied wholly

the larger part of appellant's application. Its contentions are made in connection with the authority which was granted to it by the order. The order grants authority for the continuance by appellant (1) of operations as common carrier of general commodities between Birmingham and points within 10 miles thereof, on the one hand, and on the other, all points in four southern States and the northern part of Florida, and (2) of operations as common carrier of particular commodities between specific points.

1. With respect to the authority granted appellant to operate between Birmingham and the 10-mile area outside the city limits and points in the five southern States, the appellant contends that the Commission exceeded its jurisdiction and acted arbitrarily and capriciously (Br. 3–5) in authorizing an area around Birmingham of 10 miles instead of the 100-mile area claimed by the appellant. The Commission found in its report (R. 12) that appellant had carried prior to the "grandfather" date "only 55 shipments" to or from the 100-mile area and had served "only 12 points" within that area. It further found that the "applicant, however, undoubtedly did serve various industries located in the immediate vicinity of Birmingham"; that "the extent of this industrial area is not clear from the record, but we believe that a radius of 10 miles of Birmingham will include all that is important."

These findings make clear that the Commission considered that the shipments carried by appellant, during the "grandfather" period, to, or from, an area comprising a "belt" of territory of 100-mile radius extending beyond, and around, the city limits of Birmingham did not entitle it to operating authority covering that territory; and that if the appellant was entitled to any area beyond the city limits, it was because it undoubtedly "did serve various industries in the immediate vicinity of Birmingham." The record was not clear as to the extent of this industrial area but the Commission believed that a radius of 10 miles of the city would include all that was important. In short, the Commission found that the 55 shipments carried to the 12 points did not constitute such substantial service as to entitle appellant to operating authority covering that extensive territory as an independent right. It granted it, however, a 10-mile part of the territory claimed as an area connected with the serving of the city, justifying this by its belief that the appellant undoubtedly had served various industries in the immediate vicinity of Birmingham. The record made by the appellant was not clear, but the report shows that the Commission unquestionably gave it the benefit of any doubt. As stated in *Alton R. R.* v. *United States* (Nos. 110 and 267, this Term, decided January 12, 1942), an "applicant carries

the burden of establishing his right to the statutory grant."

The Commission's report shows on its face that the action which appellant sets up as arbitrary and capricious was, on the contrary, liberal to the appellant. In fact appellant's charge of arbitrary action seems to be based (Br. 4, 5) principally on its view that the statute leaves the Commission with no administrative judgment in a case such as it presented. The appellant's position is in effect that it laid claim to the 100-mile "belt" of territory (R. 12); that the Commission found that it had carried shipments to that territory during the "grandfather" period, and that, regardless of their number (Br. 5), it was bound to grant authority in accordance with the undisputed evidence so shown of its operation during the "grandfather" period, to wit: "Between Birmingham, Alabama, and 100-mile radius thereof to points in the other States" (Br. 4). This apparent view of appellant that the Commission, having found that shipments had been carried into the territory claimed by it, had no further duty to perform except the ministerial one of issuing to appellant a certificate of operating authority covering the territory appears to rest (Br. 7) on its conception of those words of the statute (Sec. 206 (a), Motor Carrier Act, 1935) which provide for certificates authorizing operation "* * * over the route or routes or within the territory for which application is made * * *."

This provision is the one under which the Commission authorizes irregular-route operations, but the Commission has not, of course, considered that it was required upon any showing of operation during the "grandfather" period to grant operating authority covering the territory claimed by an applicant. The words "within the territory" evidence the intention of Congress to vest the Commission with a latitude of judgment sufficient to produce reasonable results.

2. With respect to the authority which the Commission granted appellant to operate as a common carrier of particular commodities between specific points, the appellant contends that the Commission erred as matter of law in limiting the authority to specified commodities. Its contention is in effect that the Commission, having found that it was engaged during the "grandfather" period in bona fide transportation of a particular commodity, or particular commodities, between the points was bound by that finding to grant operating authority covering general commodities. The appellant rests this contention on the fact that the statute does not expressly authorize the Commission to grant certificates covering specified commodities, and on its statement that the universal conception of a common carrier is one carrying general commodities. Appellant particularly points to the fact that certificates of public convenience and necessity issued to railroads have always contemplated the carriage of

general commodities. But the differences between the operations, service, and practices of railroads on the one hand from those of motor carriers on the other are matters of common knowledge, and Congress before enacting the Motor Carrier Act had given long consideration to the operations of motor carriers and the place occupied by them in the transportation service rendered the public.

Congress has prescribed the standard of "bona fide operation" for the Commission's guidance. The fact that the evidence of a motor carrier's operations during the "grandfather" period was adequate to enable the Commission to find that it was bona fide engaged in the transportation, say, of some single high-rated commodity between a city in one State and a city in another State, could not reasonably be expected to enable the Commission to find that the carrier was bona fide engaged in the transportation of general commodities—all commodities suitable for transportation in an ordinary truck, with certain exceptions.

ARGUMENT

I. The fact that the Commission, in authorizing continuance by appellant of operations between Birmingham and its industrial area, on the one hand, and points in other States, on the other hand, failed to extend the area to include a "belt" of territory of 100-mile radius, was not error as matter of law or arbitrary action

The appellant's first contention relates to the authority granted it by the Commission to operate as common carrier of general commodities between

Birmingham and the 10-mile area outside the city limits to points in five southern States. In connection with this authorization, the appellant contends that the Commission erred as matter of law and acted arbitrarily and capriciously in authorizing an area around Birmingham of 10 miles instead of the 100-mile "belt" of territory which it asked the Commission to include in the authorization. Referring to the claim made by appellant to this territory the Commission's report reads (R. 12):

> "On exceptions, applicant concedes that it may not be entitled under the 'grandfather' clause to authority to transport general commodities from, to, and between all points covered by the amended application, but it insists that it is entitled to authority to transport general commodities between Birmingham and points within 100 miles thereof, on the one hand, and, on the other, all points in North Carolina, South Carolina, * * *. As pointed out above, however, only 55 shipments were transported prior to June 1, 1935, to or from points within 100 miles of Birmingham. The record shows further that only 12 points were served in this comparatively large territory surrounding applicant's headquarters at Birmingham. Undoubtedly, however, applicant did serve various industries located in the immediate vicinity of Birmingham. The extent of this industrial area is not clear from the record but we believe that a

radius of 10 miles of Birmingham will include all that is important."

The appellant's contention, presumably, is based on the statements and findings shown in the above portion of the report. Its position is in effect that it applied for the 100-mile "belt" of territory; that the Commission specifically found that it had, during the "grandfather" period transported shipments to and from points within 100 miles of Birmingham; that the Commission must grant a carrier a certificate upon proof of bona fide operation prior to the "grandfather" date; and that the Commission "is without jurisdiction to determine arbitrarily that a certain number of shipments are not sufficient to grant authority in that territory."

It will be seen that the Commission found that appellant had carried prior to the "grandfather" date "only 55 shipments" to or from the 100-mile area and had served "only 12 points" within that area; that it further found that the "appellant, however, undoubtedly did serve various industries located in the immediate vicinity of Birmingham"; that "the extent of this industrial area is not clear from the record but we believe that a radius of 10 miles of Birmingham will include all that is important." These findings make clear that the Commission considered that the 55 shipments carried by appellants did not constitute such substantial service as to entitle it

to operating authority covering that extensive territory as an independent right; that since, however, it had undoubtedly served various industries in the immediate vicinity of Birmingham, it was entitled to have the operating authority include an industrial area in connection with the service rendered the city; that the record did not make possible a definite determination of the industrial area but it believed that a radius of 10 miles from the city would include all that was important. This action was not arbitrary but, on the contrary, was liberal to the appellant especially when it is remembered that the burden of establishing its right was on the appellant. *Alton R. R.* v. *United States, supra.*

Moreover, the appellant is not, apparently, referring to arbitrariness of administrative judgment on the facts. It makes plain that its position is that the statute vested the Commission with no "jurisdiction" to determine what number of shipments was sufficient; that the Commission, having found that shipments had been carried by appellant to and from the territory during the "grandfather" period, "the Commission was bound", regardless of their number, or any other consideration, "to grant authority in accordance with the undisputed evidence of operations" during such period, "to wit: Between Birmingham, Alabama, and 100 mile radius thereof to points in the other States" (Br. 4).

This contention of appellant seems negatived by its statement. It is, in effect, that an applicant for "grandfather" rights need only establish that he made some shipments during the "grandfather" period; for its own claim of territory would, in accordance with the contention, establish his right thereto. The Commission would be left with only the ministerial duty to perform of issuing to such applicant a certificate of operating authority for whatever it saw fit to claim. The extreme to which the logic of appellant's contention leads and to which it is in fact carried here brings conviction that appellant is wrong in its conception of the statute.

The provision of section 206 (a) of the Motor Carrier Act that a certificate shall issue if any such carrier was in bona fide operation "over the route or routes or *within* the territory for which application is made * * *" was plainly not intended to leave the body charged with its administration without judgment as to the extent of the rights, if any, established by a claimant's operation. The words "within the territory" do not indicate that any operation whatsoever establishes an applicant's operating right to the territory applied for but, on the contrary, clearly evidence the intention of Congress to commit to the Commission's judgment the question as to just what right had been established within the territory by an operation therein. The provision is

the one under which applications for "grandfather" rights are required to be submitted to the scrutiny of the Commission. The statute prescribes the standard of "bona fide operation" for the Commission's guidance, and the words "within the territory" are plainly intended to leave to the Commission's determination the question of what bona fide operation within the territory was in fact established. The recent decision in *Alton R. R.* v. *United States, supra,* is, we believe, determinative of this. Here appellant's evidence did not establish that it had "grandfather" right to any of the 100-mile belt of territory as independent territory, but as to 10 miles thereof the Commission determined that it might properly be included as industrial area in connection with the operating authority granted appellant covering the city of Birmingham.

II. The Commission, in those instances where the evidence showed that appellant carried, during the "grandfather" period, only one commodity, or a few particular commodities, with such degree of regularity as to constitute substantial service, was not required as matter of law to grant appellant operating authority covering general commodities

The appellant's second contention (Br. 5) is that the Commission, in those instances where it authorized the appellant to transport particular commodities between Birmingham and specific points in States other than Alabama and between specific points, not including Birmingham, erred

as matter of law because it did not extend such authorization to cover general commodities. This contention, similarly as appellant's first contention, challenges the Commission's "jurisdiction" or statutory authority. Concretely described, appellant's position is to the effect that the Commission, having found that the appellant was a common carrier by motor vehicle and that it was engaged, during the "grandfather" period in the bona fide transportation, for example, of "paper and paper products from Birmingham to New Orleans, La." (R. 11), the statute required of the Commission that it grant appellant authority to transport general commodities. This contention, taken together with appellant's first contention that any shipments shown to have been carried to a territory during the "grandfather" period establishes an applicant's right to the territory claimed, would, if sound, require the Commission, predicated upon its finding of bona fide transportation of paper and paper products from Birmingham to New Orleans, La., to grant appellant authority to transport general commodities, not only to New Orleans, but to all points in Louisiana, which latter State, among others, was claimed in the application.

In the case used for illustration the appellant is shown in the report (R. 11) to have carried only paper and paper products during the "grandfather" period from Birmingham to New Orleans.

This plainly did not constitute substantial service in the transportation of general commodities either for the movement to New Orleans or covering the State of Louisiana.

Appellant states (Br. 9) that the universal conception of a common carrier is one which carries general commodities and it points particularly to the fact that certificates of public convenience and necessity issued to the railroads are not granted for specified commodities. But the differences between the operations, services, and practices of the railroads and those of motor carriers are well known. Congress, before enacting the Motor Carrier Act, had given long consideration to the motor carrier industry and it cannot be assumed to have legislated without knowledge of the operations which motor carriers in fact conduct. *United States* v. *Maher*, 307 U. S. 148. The Commission's decision here gives effect to the *actual* operations and service which appellant's evidence showed that it was performing substantially during the "grandfather" period. Between Birmingham and the five southern States it was shown to have been engaged in the transportation of a wide variety of commodities, entitling it to a certificate covering general commodities. Between Birmingham and New Orleans it was shown to have been engaged in the transportation of paper and paper products. It would seem that it was for the very purpose of having an administrative body ascertain and deter-

mine just such differences that Congress committed to the Commission the duty of scrutinizing "grandfather" applications. For the Commission's guidance it prescribed the standard of bona fide operation. The Commission could not be expected to be satisfied that a showing of bona fide operation during the "grandfather" period in the transportation of paper and paper products was on a "substantial parity" (*Alton R. R.* v. *United States, supra*), with a showing of bona fide operation during that period in the transportation of general commodities, entitling an applicant to a permanent grant of authority covering "future operations" (*id.*) in the transportation of all commodities suitable for transportation in an ordinary truck, with certain exceptions.

The appellant states that it must necessarily be considered to have been holding itself out to carry general commodities. The first answer to this is that, in the view of the Commission, there must have been service during the "grandfather" period consistent with an applicant's holding out; and this, it would seem, is a very reasonable and necessary principle, and within the province of the Commission to apply. The second answer is that there is no proof that appellant did so hold itself out. The Commission's report states that appellant held itself out to carry general commodities between Birmingham and the five south-

ern States, but appellant cannot advance this with respect to operations in other territory where it is shown to have been transporting during the "grandfather" period only specific commodities (R. 11). Evidence as to holding out may be by way of testimony, rates, solicitation, and advertising in many forms. Testimony has to be considered in the light of circumstances of particular operations. In short, no presumption exists as to a motor carrier's holding out. As stated in *Alton R. R.* v. *United States, supra,* an "applicant carries the burden of establishing his right to the statutory grant."

Unlike the railroads many motor carriers have not been carriers of general freight. As is stated in the fourth Report of the Federal Coordinator of Transportation (House Doc. 394, 74th Cong., 2d Sess., Jan. 21, 1936, at pages 26–27):

> "* * * property carriers * * * are of many kinds and descriptions. Some are common carriers, but many of these confine their operations to *special commodities.* * * *
>
> In general, they are small enterprises. A great number are individuals operating only a single truck. * * * [Italics ours.]

Irregular route operators are in a position to elect to carry only high-class commodities—the cream of the traffic. (See second Coordinator

report, Senate Doc. No. 152, 73d Cong., 2d Sess. (1934), pp. 15, 16 ff., 23–24, 33). The existence of many carriers who confine their operations to particular commodities being well known, Section 203 (a) (14) of the Motor Carrier Act defines a common carrier as a carrier of property "or any class or classes of property."

In *Merchants, etc. Application,* 21 M. C. C. 93, the applicant requested authority under the "grandfather" proviso to transport general commodities throughout a wide territory over irregular and unspecified routes. The Commission found that the evidence justified only a certificate authorizing carriage of certain specified commodities, saying in its report, "the term 'general commodities' is entirely too comprehensive to be used in connection with any authority herein granted, especially when one considers the size, location, and accessibility of the various large cities within the territory involved. Accordingly, the record warrants the conclusion that applicant has been engaged in transportation, in interstate or foreign commerce, only of those commodities which are set forth in appendix B attached" (*id.* at 103). To the same effect are *Powell Application,* 9 M. C. C. 785, 791–792; *Loving Common Carrier Application,* 12 M. C. C. 571; *Eastern Carrier Corp. Common Carrier Application,* 14 M. C. C. 430; *Langer Application,* 23 M. C. C. 302, 305; *Lett Application,* 26 M. C. C. 159, 165.

Appellant advances (Br. 10) as an argument showing that the Commission is without authority to specify the commodities which an applicant for a "grandfather" certificate may carry, the point that the holder of a limited certificate who may at a future time desire to carry a commodity which has "recently come into existence", must file a new application for an additional certificate authorizing the transportation of the new commodity. The necessity for a new certificate would arise likewise when a carrier desires to carry a long-existent commodity in addition to those he is already authorized to handle. There is nothing unreasonable in this. The established carriers having adjusted themselves to the transportation of one commodity by this carrier and another commodity by that, it would obviously be to the detriment of the motor carrier industry if one of their number should be permitted to trench upon the business of another by beginning the carriage of commodities already carried by the other, unless upon a showing that the public convenience and necessity require the change. Many motor carriers holding certificates authorizing the carriage of specific commodities have, without questioning their duty to do so, applied to the Commission for additional certificates which would permit the transportation of additional commodities. The right to a certificate authorizing such additional transportation would, of

course, be based, not upon a vague willingness to carry, of which the public was more or less clearly informed back in 1935, but upon factual showing of public convenience and necessity as of the present time. *Frank T. Geroulo Extension of Operations,* 4 M. C. C. 237; *David S. Campbell Extension of Operation-Spray Materials,* 10 M. C. C. 799; *Clark W. Howell Extension of Operations,* 8 M. C. C. 519; *Joseph H. Smith Extension of Operations,* 12 M. C. C. 211. It is in fact a common practice for holders of "grandfather" certificates covering a specific commodity or commodities to apply for and receive certificates under Section 207 in cases where they desire to enlarge their operations by the inclusion of other commodities subsequent to the "grandfather" date.

Appellant's view that the statute leaves the body administering it without administrative judgment to determine the extent of an applicant's irregular-route operations is shown to be fundamentally wrong by this Court's decision in *Alton R. R.* v. *United States, supra.* Cf. *Gray* v. *Powell* (No. 18, decided December 15, 1941); *Shields* v. *Utah-Idaho Central R. Co.,* 305 U. S. 177.

CONCLUSION

In conclusion we respectfully submit that the decree of the lower court should be affirmed.

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Of Counsel.

JANUARY 1942.

APPENDIX

Statutes involved

Pertinent provisions of the Interstate Commerce Act important in the consideration of this case are:

Part II. "Sec. 206 (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will

be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *."

"Sec. 208. (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the car-

rier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

U. S. GOVERNMENT PRINTING OFFICE: 1948

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 210.

HOWARD HALL COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellee.

BRIEF OF AMICUS CURIAE

JAMES W. WRAPE, Attorney for
Regular Common Carrier Conference, of the
American Trucking Association, Inc.

January, 1942.

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HOWARD HALL COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellee.

BRIEF OF AMICUS CURIAE.

This brief is filed on behalf of the Regular Common Carrier Conference of The American Trucking Associations, Inc., which is a non-profit corporation constituting the national organization of the trucking industry. The Regular Common Carrier Conference is a division of the trucking industry organized primarily to protect and further the interest of the regular route common carriers by motor vehicle. This conference is composed of a large number of regular route common carriers by motor vehicle engaged in the transportation of property. Its members are vitally interested as competing carriers, in the question of statutory construction and its applica-

tion to the Motor Carrier Act as involved in the instant case.

THE OPINION OF THE COURT BELOW.

The opinion of the District Court (R. 43-49) is reported in 38 Federal Supplement 556. The report of the Interstate Commeree Commission (R. 8-14) appears in 24 M.C.C. 273.

JURISDICTION.

The jurisdiction of this Court has been asserted by the appellant under authority of Title 28, Sections 46 and 47, of United States Code, Ann., 36 Stat. 1148, 38 Stat. 32, seeking to set aside and annul the final order of the Interstate Commerce Commission, made under the Motor Carrier Act, 1935, as amended, Title 49, Section 301, etc., 49 Stat. 543.

STATEMENT OF THE CASE.

The appellant, a common carrier by motor vehicle of property, in interstate commerce, asserted presumptive rights to a certificate of public convenience and necessity under the provisions of Section 206a, Motor Carrier Act of 1935, alleging that it was engaged in the transportation of general commodities between all points in the states of Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New York, New Jersey, District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnet, and all points in Texas within 200 miles of Henderson, Texas.

The Interstate Commerce Commission assigned the application for hearing and appellant amended the application as originally filed, to eliminate therefrom the states of Wisconsin, Texas, Arkansas, Kansas, and Missouri, and that part of Florida south of Tampa and Lakeland, and that part of Illinois north of Chicago (R. 9).

The Interstate Commerce Commission, on July 10, 1940, by Division 5, served its report and order, in which it found that appellant was, on June 1, 1935, and continuously since that time, had been, in bona fide operation as a common carrier by motor vehicle, of general commodities (with certain exceptions), between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida, on and north of a line consisting of U. S. Highway 92, from Tampa to Kissimmee, thence U. S. Highway 192 to Melbourne; (b) of paper and paper products from Birmingham to New Orleans, Louisiana, Chattanooga and Knoxville, Tennessee, and from Kingsport, Tennessee, to Birmingham; (c) of nails, pipe, pipe fittings, steel and metal ceiling, from Canton, Ohio, to Birmingham; (d) of cloth from Alabama City, Alabama, to Wheeling, West Virginia; (e) and of matches from Wheeling, West Virginia, to Chattanooga and Birmingham; all over irregular routes; and that by reason of such operation it was entitled to a certificate authorizing the continuance thereof. In all other respects the presumptive right to a certificate as asserted by the appellant was denied. (R. 13, 14.)

The appellant then addressed a petition for further consideration to the entire Commission, which petition was denied on February 3, 1941. (R. 14, 15.)

The appellant then filed its complaint in the District Court for the Northern District of Alabama, Southern Division, seeking to restrain the enforcement of the order of the Interstate Commerce Commission insofar as the Commission's order amounted to a denial of a part of the application, as amended.

The District Court, on April 17, 1941, filed its opinion, dismissing the complaint, and affirming the decision of the Interstate Commerce Commission. (R. 43-49.)

ASSIGNMENTS OF ERROR.

The appellant charges the District Court erred, as a matter of law, in two substantial issues, which may be defined as follows:

(a) In affirming the decision of the Interstate Commerce Commission which limited appellant's operating authority between Birmingham and points and places within 10 miles thereof, on the one hand, to points and places in certain named states, on the other hand.

It is contended by the appellant that the Commission's finding in its final report that the appellant had transported 55 shipments of freight to and from points within 100 miles of Birmingham, Alabama, and points in other states, prior to June 1, 1935, entitled appellant to a certificate of public convenience and necessity that would authorize applicant to continue its operation from the larger area.

(b) That the Court erred in affirming the decision of the Interstate Commerce Commission, which limited appellant's operation to certain designated and specific commodities, between particular points (such as paper and paper products from Birmingham to New Orleans, Louisiana, etc.). It is contended by the appellant that the Commission, having found appellant to be a common carrier, engaged on June 1, 1935, in the transportation of the named specific commodities, imposed a commodity limitation in excess of its jurisdiction and contrary to the provisions of the Motor Carrier Act, 1935, as amended.

STATUTES INVOLVED.

We have appended to this brief, the relevant provisions of the Motor Carrier Act, 1935, as amended, which were in effect on the date of the Commission's order, July 10, 1940. (Infra pp. 29, 30, 31, 32.)

SUMMARY OF ARGUMENT.

I. The District Court correctly interpreted the "grandfather" clause (Section 206(a)) provisions of the Motor Carrier Act, 1935, in approving the Commission's finding that the appellant, was on June 1, 1935, engaged in a *bona fide* operation between Birmingham and points and places within 10 miles thereof, on the one hand, and on the other hand, points and places in the territory defined.

II. The District Court correctly interpreted the "grandfather" clause (Section 206(a)) provisions of the Motor Carrier Act, when it approved the action of the Commission, wherein the Commission limited the certifi-

cate of appellant to an operation authorizing the transportation of the specific commodities actually transported between certain designated points; and in approving the policy pursued by the Commission of issuing certificates authorizing the transportation of general commodities throughout wide areas, over irregular routes, only when the evidence indicates a substantial showing of bona fide service.

BRIEF AND ARGUMENT.

Point I.

The appellant contends that it is entitled, upon the findings of fact set out in the report of the Commission, to a certificate authorizing it to conduct a non-radial[1] operation between points, located within a radius of 100 miles of Birmingham (an area of approximately 32,000 square miles), on the one hand, and points and places in the various states awarded, on the other.

However, the Commission in its order of July 10, 1940, limited the operation to points and places within a 10 mile radius of Birmingham despite the fact that in its report it found that the appellant had transported 55 shipments to and from 12 different points (R. 12) located within a 100 mile radius of Birmingham during the 17

[1] Defined by the Commission in Ex Parte No. MC-10 (2 M.C.C. 703), as follows:

"(D) Irregular-route nonradial service.—An irregular-route nonradial-service carrier is any person who or which undertakes to transport property or any class or classes of property in interstate or foreign commerce by motor vehicle for compensation over irregular routes between points or communities located within such general territory as shall have been defined geographically and authorized in a certificate of public convenience and necessity, or permit, and any other points or communities located within the same general territory without respect to a hub community or a fixed base point of operation."

months "immunizing" period immediately preceding the "critical" or statutory date of June 1, 1935. (R. 9.)

The action of the Commission in so limiting the operating authority covered in the certificate is said to be arbitrary and in excess of the jurisdiction conferred by the provisions of the Motor Carrier Act, 1935, especially Section 206 (a).

Section 206(a)[2] of the Motor Carrier Act, provides:

> "... that ... if any carrier ... was in bona fide operation on June 1, 1935, ... and has so operated since that time ... the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application is made to the Commission ..."

Section 207[3] provides:

> "... a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application ..."

Section 208[4] provides:

> "Any certificate issued under section 206 or 207 shall specify the service to be rendered ... and in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate ..."

The appellant in asserting a presumptive claim under the "grandfather clause" proviso of Section 206 (a) alleged a bona fide operation prior to, on, and since the

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[2] Section 206(a) reproduced in full in Appendix, page 30.
[3] Section 207 reproduced in full in Appendix, page 31.
[4] Section 208 reproduced in full in Appendix, page 32.

critical statutory date of June 1, 1935, to, from, and between all points and places in some 25 states. (R. 9, 29-31.)

By amendment at the first hearing, appellant wholly eliminated five states and parts of two other states. (R. 9.)

Appellant's claim to a certificate as finally presented to the Commission involved an operation, in the transportation of general commodities, to, from, and between all points and places in practically all of the states east of the Mississippi, except the New England States. (R. 9.)

As heretofore stated, appellant's present claim is to a certificate authorizing a non-radial operation between points within a radius of 100 miles of Birmingham, on the one hand, and points and places within the States of North and South Carolina, Georgia, Mississippi, and the North half of Florida, on the other hand. (R. 12, 59.)

The Commission, pursuant to Section 206 (a), after two full hearings before the Examiner, briefs by all parties, and exhaustive consideration, found appellant's bona fide operation on June 1, 1935, to be that of a common carrier of general commodities, within the territory defined, and pursuant to Section 207 (a), caused a certificate to issue "authorizing ... part of the operation covered by the application" found to be bona fide and pursuant to the provisions of Section 208 (a) specified in the certificate "the territory within which the motor carrier is authorized to operate."

In so limiting the operations covered by the certificate issued, the Commission followed its early announced and constantly pursued policy of issuing authority to

transport general commodities throughout a wide territory, over irregular routes, pursuant to the "grandfather" clause provisions of the act, to a carrier only when such carrier's right thereto has been proved by substantial evidence of actual service within the claimed area during the immunizing period prior to June 1, 1935.[8]

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[8] Bronstein Contract Carrier Application, 2 M. C.C., 95, 96, 97 (decided June 3, 1937), where the Commission said:

"It is obvious that any certificate or permit issued pursuant to the provisions of Section 206 (a) or 209 (a) must necessarily be predicated upon the motor-carrier operations performed by applicant on the respective statutory dates, and continuously since that time, and that a mere holding out, or an offer, to operate on the specific dates, is not the equivalent of bona fide operation as that term is used in those sections. The burden of proof is upon applicant to establish the character and scope of his operations."

Crescent Transp. Co. Common Carrier Application, 2 M.C.C., 313, 315 (decided July 6, 1937), where the Commission said:

"Any certificate or permit issued pursuant to the provisions of Sections 206(a) or 209(a) must necessarily be predicated upon the motor-carrier operations engaged in by applicants on the respective statutory dates and continuously since that time, and a mere holding out, or offer to operate, on the specified dates, is not the equivalent of bona fide operation, as that term is used in those sections. The burden of proof is upon applicants to establish the character and scope of their operations."

System Arizona Express Service, Inc., Common Carrier Application, 4 M.C.C., 129, 133 (decided Jan. 14, 1938), where the Commission said:

"It would be difficult, if not impossible, to lay down any comprehensive rule as to the showing required to establish a bona fide operation within the act. It seems clear, however, that some consistency of movement must be shown as distinguished from merely a sporadic shipment or two at remote intervals. Beginning with the statutory date, and continuously thereafter, there should be shown some consistency of service, either a regular service or an irregular service of such consistency and continuity as to be undoubted. The frequency and volume required to be shown would depend on what would reasonably be expected of an operator endeavoring to give a good-faith service to a particular place, or over a particular route, having in mind the size, location, and accessibility of the place and the quality of the route."

Powell Bros. Truck Lines, Inc., 9 M.C.C., 785 (decided Oct. 8, 1938), where the Commission said:

"Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the 'grandfather' clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence."

In announcing this policy, the Commission has refused to consider the applicant's claim "of holding out to transport," in and of itself, as a substitute for actual service rendered, unless there has been actual operation consistent with claim of an offer to serve.

This policy has received judicial as well as legislative sanction.

In Loving vs. United States, 310 U. S. 609, this court affirmed, per curiam, the decree of the District Court, 32 Federal Supplement 464, which sustained the validity of the Commission's order in Loving Common Carrier Application, 12 M.C.C. 571.

Loving had filed an application, under the "grandfather clause" provisisions of Section 206 (a) seeking a certificate which would authorize the transportation of general commodities to, from and between all points in five states over irregular routes.

The Commission found (12 M.C.C. 571) that the Lovings were, on June 1, 1935, and have been continuously since that time, engaged in bona fide operation as a common carrier by motor vehicle in interstate commerce, over irregular routes, of fruit and vegetables, batteries and battery parts, fiber board boxes, oil in packages, and canned goods, between points in Oklahoma on the one hand, and points in a portion of Colorado on the other.

The carrier then filed a complaint in the District Court, seeking to set aside the Commission's order, contending that a carrier in bona fide operation as a common car-

rier, assumed the obligations of a common carrier, and held himself out as a common carrier, is entitled to a certificate under the "grandfather clause" provisions, authorizing its operation over all routes and within all territories which it assumed to serve, and which it could be compelled to serve. Lovings also contended that the proof of actual operations offered at his hearing before the Commission, justified more extensive operations than those authorized by the certificate issued to it.

The District Court, in dismissing the complaint, disposed of the claim of "holding out to the public" as follows:

> We[a] must, therefore, reject the contentions of plaintiff that the mere ability to serve, as well as the holding out to the public to carry for-hire, is sufficient to satisfy the requirements of the statutes that a carrier must be in bona fide operation on and prior to June 1, 1935. We believe that bona fide operation includes actual operations conducted and carried on by a carrier prior to June 1, 1935, and subsequent thereto, and is not to be limited to actual physical operations conducted on the first day of June, 1935. A mere offer to perform the service, without any actual performance thereof, on and prior to the 'grandfather' date, is not ufficient to authorize the issuance of a certificate of convenience and necessity by the Commission. An occasional service, infrequently performed prior to June 1, 1935, unless such service is seasonal, is insufficient, as there must be a bona fide operation to warrant the issuance of a certificate by the Commission without proof as to

[a] Citing McDonald vs. Thompson, 305 U. S., 263, where this court in considering the expression "in bona fide operation," stated that such an expression "suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated, service."

necessity and convenience to be served by the granting of such authority. The Interstate Commerce Commission has established an administrative practice of granting certificates of convenience and necessity under the 'grandfather' clause, only for such operations as were shown by the evidence to have been actually performed; and has held that the 'grandfather' clause, limits the certificate to the actual commodities transported on and prior to June 1, 1935."

In Eastern Carrier Corp. vs. United States, 31 Fed. Sup. 232, somewhat similar contentions were urged. The District Court stated one of the contentions raised by the plaintiff to be as follows:

"It (plaintiff) also contends that there is nothing in the act which refers to 'sporadic transportation.' It states that all that is required under the terms of the act is that a carrier should have operated by motor vehicle on June 1, 1935, and that it has similarly operated since that time. It contends that what was intended by the 'grandfather' clause was to preserve to the carrier the right to engage in the same sort of carriage which it had engaged in upon the 'grandfather' date and prior thereto, and if the transportation was not a daily transportation, but a seasonal or occasional transportation, the Commission cannot deprive the carrier of his right to conduct such transportation."

In disposing of this contention, the Court said:

"We entertain no doubt that the Commission under the Act has power to restrict the plaintiff to the type of service it was performing on June 1, 1935, *not only as to routes operated*, but also as to the class of commodities which it carries. (Italics ours.)

Inasmuch as the record does not contain the original transcript of the proceedings before the Commission, or the evidence of operation introduced there as exhibits, we must take the facts of operation as reported by the Commission as true. Thus we see, that in the seventeen months of the "immunizing" period prior to the "critical date" of June 1, 1935,[7] the appellant transported 55 shipments[8] to and from 12[9] points, located within a radius of 100 miles of Birmingham.

Appellant cannot sustain its present claim to a certificate authorizing an operation to and from all points in an area of more than 32,000 square miles, upon proof of actual operation, during a seventeen months' period, to only 12 points, involving in all only 55 shipments, unless there is a repudiation of the Commission's policy of denying applications for a certificate covering irregular route operations, involving large areas, unless such operations, and the carrier's right to such a certificate, has been proved by substantial evidence. This policy of the Interstate Commerce Commission, was approved by this court in Loving vs. United States, supra, and should be approved in the instant case.

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[7] "Exhibits purporting to show all shipments in interstate or foreign commerce handled by applicant during the years 1934, 1935, and 1936, were submitted in evidence." (R. 9.)

[8] "Of 1,000 shipments transported prior to June 1, 1935, . . . 55 moved to or from points within 100 miles of Birmingham . . ." (R. 10.)

[9] "The record shows further that only 12 points were served in this comparatively large territory surrounding applicant's headquarters at Birmingham." (R. 12.)

As the Commission from the very beginning of its administration of the Motor Carrier Act had adopted this policy,[10] such public and contemporaneous construction should be considered controlling.[11]

We think it is now safe to say this policy of the Commission may now be regarded as having received legislative sanction.

In Loving vs. United States, supra, decided January 24, 1940, the District Court said:

> "It is doubtful that the administrative practice of the Interstate Commerce Commission has been in effect sufficiently long to be conclusive of the question involved."

Since that time Congress has sweepingly amended the Interstate Commerce Act[12] and in so doing reenacted Section 206(a) without any change in its pertinent provisions.

This court has always held that the reenactment by Congress, without change, of a statute which had re-

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[10] See Bronstein Contract Carrier, etc., cited supra, page 9.

[11] "It is sufficient to observe, says the court, that practice, and acquiescense under it, for a period of several years, commencing with the organization of the judicial system, affords and irresistible answer and indeed fixed the construction. It is a contemporary interpretation of the most forceful nature. The practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not to be disturbed. In all cases of ambiguity, the contemporaneous construction, not only of the court but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling." Shell's Executor vs. Fauche, 138 U. S. 562, 572; Logan vs. Davis, 233 U. S., 613, 627; United States vs. Sweet, 189 U. S., 471, 473; United States vs. Pugh, 99 U. S. 265, 269.

[12] First amended June 29, 1938, 52 Stat. 1238; Next amended Sept 18, 1940, 54 Stat. 923.

ceived administrative construction, is an adoption by Congress of such construction.[13]

Point II.

The order (R. 13) of the Commission authorized the issuance of a certificate permitting the transportation of specific commodities between designated points[14] (in addition to the grant of general commodities to and from the ten mile radius of Birmingham), and to this limitation of operating right, the appellant assigns error (R. 54, 55).

Appellant contends first, that the common law concept of a common carrier precludes a limitation of commodities, and secondly, that the language of Section 206(a) contains no reference to commodities and the limitation is therefore not authorized under this section.

As a matter of fact, a common carrier, at common law, was under no legal obligation to transport property of a class or kind other than that which it held itself out to carry.

Thus it was said, in the case of *Johnson vs. Midland Railway Co.* (1849) 18 L. J. Ex. 366, 4 Ex. 367, 154 English Reports (Full Reprint) 1254, at page 1257, as follows:

> "So also in the case of a carrier; and that arises from the public profession which he has made. *A per-*

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[13] Komaoa vs. United States, 215 U. S., 392, 396;
United States vs. Falk, 204 U. S., 143, 152;
United States vs. Hermanos, 209 U. S., 337, 339;
Cook vs. United States, 288 U. S., 102, 120.
Koshland vs. Helvering, 298 U. S., 441, 445;
New Haven R. R. vs. Interstate Commerce Commission, 200 U. S., 361, 401, 402.

[14] Paper and paper products from Birmingham to New Orleans, Chattanooga, and Knoxville, and from Kingsport to Birmingham; nails, pipe, pipe fittings, steel and metal ceilings from Canton, Ohio, to Birmingham; cloth from Alabama City, Alabama, to Wheeling, West Virginia; and lathes from Wheeling to Chattanooga and Birmingham.

son may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from the intermediate places."[18] (Italics ours.)

Our reported decisions, as well as our text books, follow the maxims laid down by the English courts.

In Elliotts' splendid text on "Railroads," Volume 4, paragraph 2214, it is stated:

"Refusal to carry—Excuses for.—The general rule that a railroad company is under a duty to carry goods properly offered for transportation is, as we have indicated, subject among other limitations and qualifications to the limitation that its obligation extends only to the kind of goods the company undertakes to carry.

Tunnel v. Pettijohn, 2 Harr. (Del.) 48;
Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158;
Kemp v. Coughtry, 11 Johns. (N. Y.) 107;
King v. Lennox, 19 Johns. (N. Y.) 235;
Beckman v. Shoues, 5 Rawls (Pa.) 179, 28 Am. Dec. 653; post, No. 2223. See also Southern Pac. Co. v. State, 19 Ariz. 20, 165 Pac. 303.

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[18] See also the decision in the case of McManus vs. The Lancashire and Yorkshire Rly Co., 157 English Reports (Full Reprint) 865, where at page 869, the court said:

"He may choose the kind of conveyance, the times for transit, the mode of delivery, *the articles that he will profess to carry,* what price he will have, when he shall be paid; and the duty to receive is always limited by his convenience to carry. See Jackson v. Rogers (2 Show. 327), Johnson v. North Midland Railway Company (4 Exch. 367). This right to qualify the duty of receiving, according to terms and conditions fixed by the carrier alone, comprises the right to qualify the common law duty of insuring safety, a duty (337) which has given rise to much discussion, and is now for our consideration." (Italics ours.)

In other words, railroad companies are common carriers only as to those goods which are of the kind usually or professedly carried.

Citizens Bank v. Nantucket S. B. Co., 2 Story (U. S.) 16;.

Thus, a railroad company which does not undertake to carry dogs cannot be held liable as a common carrier to one whose dog was carried in violation of the rule and by virtue of a special agreement with the baggagemaster.

Honeyman v. Oregon & C. R. Co., 13 Ore. 352, 57 Am. Rep. 20,

A farther qualification of the general rule is that railroad companies are common carriers to the extent only of those means and methods of transportation which they own, use, or hold out to the public.

Harp v. Choctaw & C. R. Co., 118 Fed. 169, 173 (quoting text)."

In 13 Corpus Juris (Secondum) page 62 (paragraph 266), it is stated that:

"In the absence of statute to other effect, a common carrier is under no duty to receive and transport property of an extraordinary character.

"U. S.-Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., Okla., 253 F. 705, 165 C.C.A. 299, and other cases.

"or other than it holds itself out as willing to carry.

"Ala.—Alabama Great Southern R. Co. v. Herring, 174 So. 502, 234 Ala. 238, and other cases."

American Jurisprudence states the rule as follows: (Volume 9. page 432, paragraph 5):

"Status as Affected by Scope or Extent of Business.—Every common carrier has the right to determine what particular line of business he will follow, and his obligation to carry is coextensive with,

and limited by, his holding out or profession as to the subjects of carriage.

"Annotation: 18 A.L.R. 1316, 1319; 8 B. B. C. 789, 801.

"If he elects to carry freight only, he will be under no obligation to carry passengers, and vice versa. Similarly, if he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed.

"Steele v. McTyer, 31 Ala. 667, 70 Am. Dec. 516, overruled on another point in Boon & Co. v. The Belfast, 40 Ala. 184, 88 Am. Dec. 761; and other cases."

And, in paragraph 290, as follows:

"Generally.—In considering the extent of a carrier's duty to receive and transport, it must be borne in mind that an individual or a corporation becomes a common carrier of just what it offers to carry.

"Therefore, a common carrier of goods is not obliged to accept and carry all personal property of every description that may be offered, but as its duty to the public springs from its offer to the public, its obligation is to carry only according to its public profession adn must necessarily be measured by it.

"Little Rock & Ft. S. R. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230;

St. Louis I. M. & S. R. Co. v. Weakly, 50 Ark. 397, 8. S. W. 134, 7 Am. St. Rep. 104;

Pittsburgh, C. & St. L. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682;

Crescent Coal Co. v. Louisville & N. R. Co. 143 Ky. 73, 135 S. W. 768, 33 L. R. A. (N. S.) 442;

St. Louis & S. F. R. Co. v. State, 76 Okla. 60, 184 P. 442, 7 A.L.R. 140;

Annotation: 15 L.R.A. 321; 5 L.R.A. (N.S.) 459; 130 A.M. St. Rep. 1071; 5 Eng. Rul. Cas. 261.

"Expressing the same rule in a somewhat different way, it may be said that the duty of a carrier is confined to accepting and carrying property of a kind that he undertakes or is accustomed to and can safely and conveniently carry.

"Pfister v. Central P. R. Co. 70 Cal. 169, 11 P. 686, 59 Am. Rep. 404;

Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044."

Appellant's second contention is hardly more tenable.

It is true that Section 206(a) does not include any reference to the word "commodities," but this section must be read in harmony with other provisions of the act.[16]

Section 206(a)[17] provides:

> "... no common carrier by motor vehicle subject to ... this part shall engage in any interstate ... operation ... provided, however, that ... if any such carrier ..."

The words "such carrier" found in the proviso, refers back to the words "common carrier."

A "common carrier by motor vehicle" is defined in this act in Section 203(a) paragraph 14[18] as "any person

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[16] "As the act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms." McDonald vs. Thompson, 305 U. S. 263, 266.

[17] Section 206(a) reproduced in full in Appendix, page 30.

[18] This paragraph of Section 203(a) is reproduced in full in the Appendix, page 29.

who . . . undertakes . . . to transport . . . property, *or any class or classes* of property, for the general public . . . over regular or *irregular routes* . . ." (Italics ours.)

The words "class or classes of property" certainly refer to "commodities."

The Commission, from the beginning of its administration of the act, has so construed Sections 203(a) and 206(a), as authorizing it to limit operating authority granted common carrier applicants under the "grandfather" clause, to the moving of the particular commodities it transported between specific points. This policy has been defined by the Commission,[10] as follows:

> "Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the 'grandfather' clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

[10] Powell Bros. Truck Lines, Inc., supra (decided Oct. 8, 1938).

This policy has been pursued by the Commission over a long period of years.[20]

The Commission has also applied this same rule in granting authority to regular route common carriers.[20A]

This policy of administration, like that affecting territorial awards, has both judicial and legislative sanction.

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[20] Jersey Coast Transfer Co., 9 M.C.C., 780, 782 (decided Oct. 8, 1938), where the Commission said:

"It apparently has attempted to obtain only a few commodities for transportation and has actually served only a comparatively small number of shippers or consignees of freight. Clearly, applicant's principal truckload operation was the transportation of coal, petroleum products, clothing and dry goods, and household goods and furniture, such other transportation as it furnished being merely incidentally thereto. To hold on this showing that applicant should be authorized to transport general commodities, manifestly would be unfair to competitors entitled to such authorization under the 'grandfather' clause, established by an actual showing of operation upon a broad scope and a holding out to transport and the transportation of all commodities offered. Under section 206 of the act, an applicant is entitled to a certificate authorizing the continuance only of such operation as it was engaged in, in a bona fide manner, on June 1, 1935, and continuously since. To authorize applicant to transport a larger number of commodities than it has ever transported or held itself out to transport, on or prior to June 1, 1935, would amount, not to an authorization of the continuance of such operation as it was engaged in on that date, but to an authorization of an extension of the scope of its operation both as to the commodities transported and the territorial extent of such operation."

Chautauqua Stor. & Transfer Co. Appl., 14 M.C.C., 227, 230, where the Commission said:

"Although applicant seeks authority to transport general commodities from Jamestown to the described territory in New York and Pennsylvania, the evidence does not indicate that applicant held itself out to transport or ever did transport a sufficient variety of commodities to warrant the granting of such broad authority. Under section 206 of the act an applicant is entitled to a certificate authorizing the continuance of such operation as it was engaged in, in a bona fide manner, on June 1, 1935, and continuously since."

[20A] Ferrell Common Carrier Application, 16 M.C.C., 93, 95 (decided March 6, 1939), the Commission said:

"Although applicants seek authority to transport general commodities, the evidence does not show that they held themselves out to transport or ever did transport a sufficient variety of commodities as would warrant the granting of such broad authority. Under section 206 of the act an applicant is entitled to a certificate authorizing the continuance only of such operation as it was engaged in, in a bona fide manner, on June 1, 1935, and continuously since."

In Loving vs. United States, supra, this identical question was before the court.

The carrier there contended that they were entitled to a certificate authorizing the transportation of all commodities between all points within the territory claimed, rather than the certificate granted by the Commission which specified particular commodities between designated points.

These contentions were based upon their claim of "holding out to the public" "within all territories which he assumed to serve" coupled with their assertion they could have been "compelled to serve."

The District Court in disposing of these contentions said:

> "We cannot agree with plaintiffs that for the purpose of construing the Act involved, the actual status of a common carrier arises in accordance with his public offer and begins immediately when such a carrier accepts any shipment within the scope of his public offer. The cases relied upon, to the effect that if a carrier hold himself out to the public to carry for hire he is a common carrier, and must fulfill his obligation to the public as such, are not controlling in construing the instant Congressional Act. It is further insisted by plaintiffs that to limit the present 'grandfather' rights of a common carrier to the specific commodities each has carried on and prior to June 1, 1935, and to operations only between the specific localities each has continuously served, where in such instance the undertaking has been more general, would interfere with the public's right to continue to be served by common carrier until new and further proof of public convenience

and necessity is shown. The purpose of the Act is regulatory, and we believe that the 'grandfather' clause was included therein for the benefit of carriers who had been in bona fide operation on and prior to the 'grandfather' date, rather than for the serving of public convenience. Adequate provision was contained in the Act for the granting of certificates upon proper showing that there is public necessity for such service.[21] We, therefore, cannot accept such reasoning of plaintiffs for a strained construction of the Act."

In Eastern Carrier Corp. vs. United States, supra, the District Court's opinion indicates that the Commission has issued the carrier a certificate, which authorized the transportation of general commodities over several routes, and had limited the carrier's operation to silk and rayon between certain termini, and hosiery from Washington to Philadelphia. The Carrier contended that such limitation of cargo was not authorized by the Act.

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[21] This appellant has availed itself of these provisions of the Act by filing an application, docked by the Interstate Commerce Commission as MC-42318, Sub-No. 1. The Commission's report and order is not printed, but in this application the appellant sought to take advantage of another exception to Section 206(a) by claiming the coverage of Section 206(b) ("Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate . . . commerce as a common carrier . . . when this section takes effect [effective date of Section 206 was October 15, 1935] may continue such operation for a period of one hundred and twenty days thereafter . . . if application for such certificate is made . . . within such period, the carrier may, . . . continue such operation until otherwise ordered . . ."). Appellant sought the right to transport "general commodities" "between Birmingham and points within 100 miles thereof, on the one hand, and, on the other, all points in Georgia, Louisiana, Mississipni, North Carolina, South Carolina, Virginia, District of Columbia, those in Florida, north of Tampa and Lakeland, etc." (R. 35, 36.) In disposing of this application, the Commission issued a certificate authorizing the transportation of "marble" from Gantts Quarry, Alabama, to all points in the States of North Carolina, South Carolina, New Jersey, Virginia, Florida, Pennsylvania, New York, Maryland, Delaware, and District of Columbia, and ordered appellant to cease and desist from all other operations instituted between June 1, 1935, and October 15, 1935. (R. 25-43.)

The District Court in disposing of this contention, said:

"We entertain no doubt that the Commission under the Act has the power to restrict the plaintiff to the type of service it was performing on June 1, 1935, not only as to the routes operated but also as to the class of commodities which it carried. While the Act does not confer such power in express terms we think that the existence of such a power is implicit in its provisions. A 'common carrier by motor vehicle' is defined by the Act, Section 203(a) 14) (49 U.S.C.A. 303(a) 14) as 'any person who or which undertakes . . . to transport passengers or property, or any class or classes of property for the general public . . .' Section 208(a) (49 U.S.C.A. 308(a)) provides that 'any certificate issued under Section 206 or 207 shall specify the service to be rendered . . .'

"In *United States v. Maher, supra,* the Supreme Court stated, p. 155, by Mr. Justice Frankfurter, 'The recognized practices of an industry give life to the dead words of a statute dealing with it.' By the enactment of the Motor Carrier Act Congress intended to regulate the motor carrier industry. Those who drafted the Act were well aware that carriers by motor vehicle were specializing in the transportation of particular commodities. It was obviously the intention of Congress by the enactment of the grandfather clause to preserve to the carrier its right to transport commodities or articles in commerce of the kind which it was transporting on June 1, 1935. If the plaintiff's predecessor was engaged in the bona fide transportation of merchandise generally at the grandfather date and this transportation was carried on by the plaintiff thereafter, a certificate of public convenience and necessity to continue that transportation should have been granted by the Commission. If the plaintiff and its predecessor was not so engaged in transportation,

the Commission committed no error in denying the application."[22]

As we stated before, the record does not include a transcript of the evidence or exhibits introduced in the hearing before the Commission, and we can only refer to the report of the Commission (R. 8-14) for the facts of actual operations conducted during the "immunizing" period prior to June 1, 1935. During the 17 month period from January 1, 1934, to June 1, 1935 (R. 9), there is nothing to indicate the handling of any commodity other than paper and paper products from Birmingham to New Orleans, Chattanooga and Knoxville, and from Kingsport to Birmingham: other than nails, pipe, pipe fittings, steel and metal ceilings from Canton, Ohio, to Birmingham: other than cloth from Alabama City, Alabama, to Wheeling, West Virginia: and other than matches from Wheeling, W. Va., to Chattanooga and Birmingham.

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[22] State courts have always so interpreted similar statutes, one of late cases (1941), is that of Gulf, Mobile & Ohio Ry. Co. vs. Luter Motor Express, Inc., 1 So. (2) 231, in which case the opinion of the Supreme Court of Mississippi, stated:

"One who was operating on the date aforesaid as a restricted carrier cannot avail of the grandfather proviso to obtain a certificate of convenience and necessity as a general common carrier. Here the record shows that what appellee had carried had been fresh cream, oil, and other petroleum products, and that such other things as were carried were merely casual, and were of comparatively rare occurrence. These sporadic or occasional incidents cannot be enlarged into the creation of a right to be certified, under the grandfather clause, as a common carrier of everything which may be transported by motor vehicle, as the order of the Commission attempted to do in this case."

"Nor does the fact that the carrier held himself out as ready, able and willing to carry any and everything for any and everybody change the legal situation so far as the grandfather proviso is concerned. What was actually and ordinarily done on and before the date mentioned is the test, and the burden of proof in such matters rests on the applicant; and, as already stated, that proof must be definite and well sustained, whence it follows that statements by a witness or witnesses which are phrased in terms of generalities are not sufficient."

It was not unusual for motor carriers, prior to the advent of Federal Legislation, to pick and choose their traffic and to confine that traffic to transportation between such terminii as it desired to operate. Obviously, traffic other than "cloth" was available at Alabama City, Alabama, and certainly "cloth" was shipped from that point to destinations other than Wheeling, West Virginia.

Appellant's actual operations, as found by the Commission, and its "holding out" to the public, were between the points for the particular "class" of traffic which it actually handled, consistent with such "holding out." There is no more reason to grant the right to transport all classes of commodities to appellant between these points than it would be to grant the right to handle general commodities to an automobile transporter within the territory it had delivered automobiles. As general commodities did move to or from almost any conceivable point, some carrier must have transported such commodities and it was a part of this plan of regulation to give to each carrier the right to continue to do exactly what it was doing on the "critical" date, thus protecting each carrier in its own right, and thereby furthering the policy set forth in Section 202(a) of the Act.[23]

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[23] Section 202(a) reproduced in full in the Appendix, page 29. See opinion in Loving vs. United States, Eastern Carrier Corp. vs. United States, supra, and United States vs. Maher, 307 U. S. 148.

This policy[24] of limiting operations to the commodities actually and consistently transported, has likewise received legislative approval, in that Section 203(a) has been amended three times,[25] and Section 206(a) has been twice amended[26] by Congress since this policy was first announced, and it may now be said, in the words of this court, to have now received congressional "adoption."[27]

In the same way the construction and interpretation of these sections announced by the Commission under the act and its continued administration in accordance therewith may be said to be now controlling unless clearly inconsistent with the language of the act.[28]

The order of the Commission in this case should be regarded as one in accordance with its early announced policies, based upon a proper finding of facts,[29] and as such there can not be urged a lack of "basic prerequisites of proof."[29]

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[24] Dakota Trans. Inc. Common Carrier Application, 3 M.C.C., 621, 624, decided December 2, 1937, where the Commission said:

"It is argued that the act does not require that the certificate specify the commodities to be transported, and that an applicant's authority need not be confined to any special commodities even though its transportation happened to be so limited as of June 1, 1935. Section 203(a) (14) of the act clearly contemplates that a person may be a common carrier of a "class or classes of property." Applicant so limited its undertaking in its operations eastbound to Chicago over route 1, and the authority to be granted herein must be limited accordingly.

[25] June 23, 1938 (52 Stat. 1029), June 29, 1938 (52 Stat. 1236), and September 18, 1940 (54 Stat. 920). In the definition of a "common carrier" contained in amendment of September, 1940, paragraph 14 of this section, was rewritten, but the phrase "property or any class or classes thereof" was reenacted.

[26] June 29, 1938 (52 Stat. 1238) and September 18, 1940 (54 Stat. 923).

[27] See cases cited, page 15, this brief.

[28] Schell's Extension vs. Fauche, supra, and other cases cited, page 14, this brief.

[29] We do not understand that appellant questions the correctness of facts found by the Commission.

This court[30] has heretofore recognized the possibility of disputed questions arising under orders issued by the Commission on "grandfather clause" applications, and it has wisely determined to let the Commission, charged by Congress with the administration of the act, formulate the policies under which that administration is to be carried out.[31]

Literally thousands of applications have been decided under these policies and if the trucking industry itself had felt that they were unfair or burdensome, its voice would have been heard in Congress, and appropriate relief would have been sought. The Motor Carrier Act has been thrice amended but its provisions pertaining to these questions have been left substantially unchanged.

CONCLUSION.

It is respectfully submitted, for the reasons stated, that the decree of the District Court should be affirmed.

JAMES W. WRAPE,
Attorney for
Regular Common Carrier Conference,
of the
American Trucking Association, Inc.

January, 1942.

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[30] Rochester Telephone Corp. vs. United States, 307 U. S. 125, 140.

[31] By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfies the dictates of fairness by affording sanction to enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission." United States vs. Maher, supra.

APPENDIX

Statutes Involved

The pertinent provisions of the Motor Carrier Act, 1935, applicable at the date of the Commission's order, July 10, 1940 (c. 498, 49 Stat. 543; c. 811, 52 Stat. 1236), are as follows:

Sec. 202 (U. S. Code, Sup. V, title 49, sec. 302). (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

Sec. 203. (U. S. Code, Sup. V, title 49, sec. 303.) (a) As used in this part—

* * * * * *

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for com-

pensation, whether over regular or irregular routes, including such motor-vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

Sec. 206. (U. S. Code, Sup. V, title 49, sec. 306). (a) Except as otherwise provided in this section and section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission, authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be

decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

SEC. 207. (U. S. Code, Sup. V, title 49, sec. 307.) (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit,

willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Sec. 208. (U. S. Code, Sup. V, title 49, sec. 308.) (a) Any cerificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1941.

Howard Hall Company, Inc., Appellant, *vs.* The United States of America and Interstate Commerce Commission.	Appeal from the District Court of the United States for the Northern District of Alabama.

[March 2, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, like *United States* v. *Carolina Freight Carriers Corp.*, decided this day, is an appeal from a district court of three judges (38 F. Supp. 556) convened to review an order of the Interstate Commerce Commission (24 M. C. C. 273) granting appellant a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" (§ 206(a)) of the Motor Carrier Act of 1935. 49 U. S. C. § 306.

Appellant made application as a common carrier of general commodities operating over irregular routes. It sought authority to operate between all points in a vast territory comprising most of the country east of the Mississippi River except the New England states. The Commission authorized the issuance of a certificate but limited it in two respects. (1) It restricted the geographical scope of the operations by authorizing service only from Birmingham, Ala., and all points within a radius of 10 miles from that city, to all points in certain states and to designated points in others. (2) Though it permitted appellant to carry general commodities throughout a large segment of the authorized territory, it limited the kinds of commodities which could be carried between specified points. Its finding containing those restrictions (24 M. C. C., p. 277) reads as follows:

"We find that applicant was, on June 1, 1935, and continuously since that time has been, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, high explosives, commodities in bulk, commodities requiring special equipment, and household goods, uncrated or in lift vans in connection

with so-called household movings between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, and South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 192 to Melbourne, of paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham, of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham, of cloth from Alabama City, Ala., to Wheeling, W. Va., and of matches from Wheeling to Chattanooga and Birmingham, all over irregular routes; that by reason of such operation it is entitled to a certificate authorizing the continuance thereof; and that the application in all other respects should be denied."

The District Court refused to enjoin enforcement of the order and dismissed the complaint. The errors urged here do not relate to the substantiality of the evidence in support of the findings. They involve two questions: whether the Commission was warranted in limiting shipments to and from points located within a 10 mile, rather than a 100 mile, radius of Birmingham; and (2) whether the Commission erred in limiting the operating rights of appellant to the transportation of only a few commodities between certain points.

I. We perceive no error in the limitation which the Commission made on the territorial scope of appellant's operations.

Appellant argues that if it may be authorized to serve all points in one state, say Georgia, without showing that every point in Georgia had been previously served by it, then it must be granted like authority as respects the 100 mile radius around Birmingham. That is a *non sequitur*. Prior operations to several points in a region may or may not justify the Commission in authorizing service throughout the whole region. The precise geographical pattern for future operations is the product of an expert judgment based on the substantiality of the evidence as to prior operations, the characteristics of the particular type of carrier, the capacity or ability of the applicant to render the service, and the like. *Alton R. R. Co.* v. *United States*, 314 U. S. —; *United States* v. *Carolina Freight Carriers Corp., supra*. The Commission employed those standards in limiting the territorial scope of appellant's operations. We cannot say that its reduction of the Birmingham area from a radius of 100 miles to a radius of 10 miles was unjustified. The Commission found that only 55 shipments were transported prior to June 1, 1935, to or from points within

100 miles of Birmingham, as against 875 to or from that city. Only 12 points were served in that large area. After June 1, 1935, 270 shipments moved to or from points within 100 miles of Birmingham as against 2,030 to or from that city. The Commission reduced the radius to 10 miles in an endeavor to include only the important industrial area surrounding that city. If we were to enlarge that area, we would clearly usurp a function which Congress entrusted to the Commission. Nor can that finding be assailed because permission to serve all points in other areas was allowed. Such a difference in treatment plainly is not erroneous as a matter of law. And nothing has been called to our attention which would even suggest that the record of prior operations or the characteristics of this transportation enterprise precluded the Commission from restricting the territory where shipments mainly originate while being more liberal as respects the territory where destination points are located.

II. We take a different view as respects the limitation on commodities which the Commission imposed in case of shipments between specified points. We do not say that that limitation was unjustified. We merely hold that in this case, as in *United States* v. *Carolina Freight Carriers Corp., supra,* the basic or essential findings to support that part of the order are lacking. The Commission's conclusion that appellant was authorized to transport general commodities between Birmingham and vicinity on the one hand and all points in designated areas on the other was based on its finding that prior to and since June 1, 1935, appellant "held itself out to transport general commodities" in that territory and "actually conducted an operation consistent with such holding out." But in case of the limitation which it imposed on the shipment of certain commodities it merely found that "prior to and since June 1, 1935, applicant transported paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tennessee, and from Kingsport, Tenn., to Birmingham; nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; cloth from Alabama City, Ala., to Wheeling, W. Va., and matches from Wheeling to Chattanooga and Birmingham."

As we indicated in *United States* v. *Carolina Freight Carriers Corp., supra,* if the applicant had established that it was a "common carrier" of general commodities during the critical periods in a

specified territory, restrictions on commodities which could be moved between specified points in that territory would not be justified. The mere fact that particular commodities had never been transported between designated points in that territory would not mean that authority to haul them between such points should be withheld. On the other hand, an applicant's status may vary from one part of the territory to another. As respects carriage between designated points, the applicant may have restricted its undertaking to particular commodities. It is not clear, however, that the Commission applied those tests in this case. From all that appears it may have allowed only paper and paper products to be shipped from Birmingham to New Orleans merely because paper and paper products were the only commodities previously carried between those cities. It is true that the Commission quoted from *Reliance Trucking Co., Inc.*, 4 M. C. C. 594, 595, to the effect that the question is whether there has been an operation within the critical periods consistent with the holding out in the natural and normal course of business, and that a mere holding out without evidence of an operation consistent therewith is not enough. Yet it also seems to have placed considerable reliance on *Powell Brothers Truck Lines, Inc.*, 9 M. C. C. 785, 791-792, which we have discussed in *United States* v. *Carolina Freight Carriers Corp., supra*, and which apparently treats irregular route carriers differently in this regard than regular route carriers. Since the influence of that view seems to have permeated the findings, we conclude that here, as in *United States* v. *Carolina Freight Carriers Corp., supra*, the case should be remanded to the Commission so that the basic or essential findings required under the rule of *Florida* v. *United States*, 282 U. S. 194, 215, may be made.

It is so ordered.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON dissent for the reasons stated in their dissenting opinion in *United States* v. *Carolina Freight Carriers Corp.*, No. 197 decided this day.